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OF

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TABLE
OF
CASES REPORTED

	Page
Ackman, Slavin v.	48
Aetna Casualty & Surety Company, Paltro v.	101
Alexis v. Pittinger	626
American Savings Bank & Trust Company, Miller v.	243
Andersen v. Andersen	71
Anderson, State v.	280
Andrews, Bassen v.	587
Arneson v. Copeman	659
Arrigoni, State v.	358
Asia v. Seattle	674
Babcock, Estes v.	270
Ball v. Bussell	206
Bank of California, Pioneer Lumber Company v.	133
Bardshar, Muller v.	252
Barnett v. Mayer & Brothers	323
Bassen v. Andrews	587
Bassett v. Rieker	513
Basye, Taylor v.	263
Beeks, State Bank of Goldendale v.	42
Belkin v. Skinner & Eddy Corporation	80
Bemis v. Meyer	599
Benham v. McLaughlin	8
Bernier, Sunnyside Land & Investment Company v.	386
Black Incorporated, Dalk v.	368
Blake Furniture Company, Moilanen v.	25
Bode v. Rhodes	98
Bounds v. Galbraith	596

Page

Bratt, Ellis-Mylroie Lumber Company v..... 142
Burbank Company, Stager v..... 516
Burch, State ex rel. Thompson v..... 1
Bussell, Ball v..... 206
Bustard, Cameron v..... 266

Callahan, State ex rel. Anderson v..... 535
Cameron v. Bustard..... 266
Cantwell, State v..... 665
Carroll, State v..... 623
Chase, Dill v..... 476
Chase, Osborn v..... 476
Chong, Keith v..... 507
Churches, Mitchell v..... 547
Clifford, State ex rel. Smith v..... 56
Cohen, Kracke v..... 329
Cohen v. Robinson..... 392
Colagino, State v..... 301
Colbard, Mitchell v..... 547
Cole v. Washington Water Power Company..... 29
Collins, State v..... 457
Commercial Sash & Door Company, Ellis-Mylroie Lumber Company v..... 142
Copeman, Arneson v..... 659
Cornwell v. Sleicher..... 573
Coulter Tow Boat Company, Rude v..... 60
Crawford, Smith v..... 580
Crooks v. Rust..... 154
Crowder, State v..... 450
Curtis, McDonald v..... 384
Curtis, Seattle v..... 229

Dale, State v..... 604
Dalk v. Black, Incorporated..... 368
Daniels, State v..... 557
Davis v. Thurston County..... 414
Dawson & Company, Peterson v..... 505

Page

Deaver v. Patterson 375
Delthony v. Standard Furniture Company 298
Department of Public Works, State ex rel. United Auto Transportation Company v 381
Dibble, Noble v 509
Dill v. Chase 476
Dowell, Kraus v 90
Drainage District No. 10 King County, In re 8
Dudman, State v 522
Dulmage Motor Company, Romano v 347
Duncan's Estate, In re 426

Ellis-Mylroie Lumber Company v. Bratt 142
Ellwanger, State v 701
Estes v. Babcock 270

Farmers' & Merchants' Bank, Norris Safe & Lock Company v 700
Farrell Lumber Company, Miller v 243
Fay, Wilson v 88
Five-Hundred Taxicab Company, Ramlo v 379
Fryberg, Miller v 243

Galbraith, Bounds v 596
Gevurtz, Pioneer Lumber Company v 133
Goninon v. Lee 471
Goodwin, State v 135
Grays Harbor County, Weatherwax v 68
Great Northern Construction Company v. Gulstine 640
Gulstine, Great Northern Construction Company v 640

Haggman, Knapp v 704
Haislett, Masterson v 650
Hansen v. Lee 691
Hardin v. State Bank of Seattle 169
Harper v. Holston 436
Hart, State v 529

Page

Henderson v. Miller 362
Henslin v. Pratt 443
Hill v. Upper 62
Hill's Estate, In re 62
Hoffman, Muckle v 519
Hoggatt, State v 457
Hoitt, Jacobs v 283
Holston, Harper v 436
Hub Mercantile Company v. Stingle 607
Hullin v. Seattle Taxicab Company 311
Hutchinson, Symons v 430

Imus v. Reeder 699
Industrial Insurance Commission, Krause v 662
Industrial Insurance Commission, Maddox v 21
In re Drainage District No. 10, King County 8
In re Duncan's Estate 426
In re Hill's Estate 62
In re Sound Transit Company 684
In re Washington Avenue, Bremerton 643
Irwin v. J. K. Lumber Company 158

Jacobs v. Hoitt 283
Jahn & Company v. Puyallup & Sumner Fruit Growers Canning Company 422
J. K. Lumber Company, Irwin v 158
Jordan v. Rieker 513

Keith v. Chong 507
Kellogg, State ex rel. Lennon v 584
King County, McClung v 14
Kline, White v 45
Knapp v. Haggman 704
Kotkins v. Seattle 590
Kracke v. Cohen 329
Kraus v. Dowell 90
Krause v. Industrial Insurance Commission 662

Page

Kundrak, Vasicsko v. 215
Kuykendall, State ex rel. Automobile Insurance Exchange v. 235
Kuykendall, State ex rel. Spokane v. 107
Kuykendall, State ex rel. Spokane Falls Gas Light Company v. 107

Lake Union Realty Company v. Woolfield. 331
Langford, Bounds v. 596
Larsen, Mullins v. 490
Larson, State v. 123, 259
Leavenworth State Bank v. Wenatchee Northern Warehouse & Marketing Company. 39
Lee, Goninon v. 471
Lee, Hansen v. 691
Levy v. Simon. 179
Liebeck, Spahr v. 53
Lindley, State ex rel. Wilson v. 698
Llewellyn, State v. 306
Los Angeles Olive Growers Association v. Pacific Grocery Company 293

McClung v. King County. 14
McDonald v. Curtis. 384
McDonald v. McDonald. 396
McGoldrick Lumber Company, Oregon-Washington Railroad & Navigation Company v. 119
McLaughlin, Benham v. 8
Madden v. Nippon Auto Company. 618
Maddox v. Industrial Insurance Commission. 21
Martin, State Bank of Seattle v. 169
Masterson v. Haislett. 650
Mayer & Brothers, Barnett v. 323
Meyer, Bemis v. 599
Miller v. Fryberg. 243
Miller, Henderson v. 362
Miller v. Smith. 163

Page

Mitchell v. Churches 547
Moilanen v. Blake Furniture Company 25
Morden v. Morden 176
Moren, Bemis v 599
Morris, Peterson v 335
Muckle v. Hoffman 519
Muller v. Bardshar 252
Mullins v. Larsen 490
Mullins Saw Mill Company v. Woolfolk 55

Nipges v. Thornton 464
Nippon Auto Company, Madden v 618
Noble v. Dibble 509
Norris Safe & Lock Company v. Farmers' & Merchants' Bank 700

Oliver v. Taylor 190
Olson v. Solberg 496
Olympic Smelters Company, Wonder v 614
Oregon-Washington Railroad & Navigation Company v. McGoldrick Lumber Company 119
Ortel v. Stone 500
Osborn v. Chase 476

Pacific Grocery Company, Los Angeles Olive Growers Association v 293
Paltro v. Aetna Casualty & Surety Company 101
Partlow, State ex rel. Lehman v 316
Patterson, Deaver v 375
Peterson v. Dawson & Company 505
Peterson v. Morris 335
Pioneer Lumber Company v. Gevurtz 133
Pittinger, Alexis v 626
Plastino v. Seattle 195
Polisky v. Puget Sound Electric Railway 72
Pontius, Smith v 211
Pratt, Henslin v 443

Page

Pratt, Stevens & Company v. 232
Price v. Royal Insurance Company, Limited, of Liverpool 93
Puget Sound Electric Railway, Polisky v. 72
Puyallup & Sumner Fruit Growers Canning Company, Jahn & Company v. 422

Ramlo v. Five-Hundred Taxicab Company 379
Randall v. School District No. 44 of Grays Harbor County 222
Reeder, Imus v. 699
Revelare International Secret Service v. Whatcom County 646
Rhodes, Bode v. 98
Rieker, Bassett v. 513
Rieker, Jordan v. 513
Robinson, Cohen v. 392
Romano v. Dulmage Motor Company 347
Rowntree, Dalk v. 368
Royal Insurance Company Limited of Liverpool, Price v. 93
Rude v. Coulter Tow Boat Company 60
Rust, Crooks v. 154
Rust, State v. 480
Rustan v. Southern Alaska Canning Company 350

St. Luke's Hospital, Ellis-Mylroie Lumber Company v. 142
Sayles v. Seattle 12
School District No. 44 of Grays Harbor County, Randall v. 222
Seattle, Asia v. 674
Seattle v. Curtis 229
Seattle, Kotkins v. 590
Seattle, Plastino v. 195
Seattle, Sayles v. 12
Seattle Taxicab Company, Hullin v. 311

Page
Shears, State v. ... 275
Simon, Levy v. ... 179
Simpson, State v. ... 653
Skinner & Eddy Corporation, Belkin v. ... 80
Slavin v. Ackman. ... 48
Sleicher, Cornwell v. ... 573
Smith v. Crawford. ... 580
Smith, Miller v. ... 163
Smith v. Pontius. ... 211
Solberg, Olson v. ... 496
Sound Transit Company, In re. ... 684
Southern Alaska Canning Company, Rustan v. ... 350
Spahr v. Liebeck. ... 53
Stager v. Burbank Company. ... 516
Standard Furniture Company, Delthony v. ... 298
Starwich, State ex rel. Tingstad v. ... 561
State v. Anderson ... 280
State v. Arrigoni ... 358
State v. Cantwell ... 665
State v. Carroll ... 623
State v. Colagino ... 301
State v. Collins ... 457
State v. Crowder ... 450
State v. Dale ... 604
State v. Daniels ... 557
State v. Dudman ... 522
State v. Ellwanger ... 701
State v. Goodwin ... 135
State v. Hart ... 529
State v. Hoggatt ... 457
State v. Larson ... 123, 259
State v. Llewellyn ... 306
State v. Rust ... 480
State v. Shears ... 275
State v. Simpson ... 653
State v. Strong ... 426

Page
State v. Tibbits 611
State v. Wallace 457
State v. Warden 290
State v. White 512
State Bank of Goldendale v. Beeks 42
State Bank of Seattle, Hardin v 169
State Bank of Seattle v. Martin 169
State ex rel. Abbott v. Superior Court, Skagit County 26
State ex rel. Andersen v. Superior Court, Lincoln County 406
State ex rel. Anderson v. Callahan 535
State ex rel. Automobile Insurance Exchange v. Kuykendall 235
State ex rel. Douglas v. Stratiner 667
State ex rel. Lehman v. Partlow 316
State ex rel. Lennon v. Kellogg 584
State ex rel. Marshall v. Superior Court, Snohomish County 631
State ex rel. Nichols v. Superior Court, Grays Harbor County 218
State ex rel. Parr v. Wallis 614
State ex rel. Pendleton v. Superior Court, King County 73
State ex rel. Schleif v. Superior Court, Okanogan County 372
State ex rel. Smith v. Clifford 56
State ex rel. Spokane v. Kuykendall 107
State ex rel. Spokane Falls Gas Light Company v. Kuykendall 107
State ex rel. Thompson v. Burch 1
State ex rel. Tingstad v. Starwich 561
State ex rel. United Auto Transportation Company v. Department of Public Works 381
State ex rel. Wilson v. Lindley 698
Stevens & Company v. Pratt 232

Page

Stingle, Hub Mercantile Company v..... 607
Stolze v. Stolze.....701, 703
Stone, Ortel v..... 500
Stratiner, State ex rel. Douglas v..... 667
Strong, State v..... 426
Sunnyside Land & Investment Company v. Bernier 386
Superior Court, State ex rel. Abbott v..... 26
Superior Court, State ex rel. Andersen v..... 406
Superior Court, State ex rel. Marshall v..... 631
Superior Court, State ex rel. Nichols v..... 218
Superior Court, State ex rel. Pendleton v..... 73
Superior Court, State ex rel. Schleif v..... 372
Symons v. Hutchinson..... 430

Tannehill, Bode v..... 98
Taylor v. Basye..... 263
Taylor, Oliver v.....190
Thornton, Nipges v..... 464
Thurston County, Davis v..... 414
Tibbits, State v..... 611

United States Fidelity & Guaranty Company, Ellis-Mylroie Lumber Company v..... 142
Upper, Hill v..... 62

Vasicsko v. Kundrak..... 215

Wallace, State v..... 457
Wallis, State ex rel. Parr v..... 614
Warden, State v..... 290
Washington Avenue Bremerton, In re..... 643
Washington Water Power Company, Cole v..... 29
Weatherwax v. Grays Harbor County..... 68
Wenatchee Northern Warehouse & Marketing Company, Leavenworth State Bank v..... 39
Whatcom County, Revelare International Secret Service v..... 646

Page

White v. Kline 45
White, State v 512
Wilson v. Fay 88
Wonder v. Olympic Smelters Company 614
Woolfield, Lake Union Realty Company v 331
Woolfolk, Mullins Saw Mill Company v 55

TABLE

OF

CASES CITED BY THE COURT

			Page
Abrahamson v. Cummings	65	Wash. 35	621
Acme Cement Plaster Co. v. Westman	20	Wyo. 143	274
Adams v. State	12	Ga. App. 808	96
Adams Mach. Co. v. Turner	162	Ala. 35	297
Ah How v. Furth	13	Wash. 550	51
Alexander v. Barnes Amusement Co.	105	Wash. 346	620
Allen v. Bellingham	95	Wash. 12	688, 690
American Hoist & Derrick Co. v. Frey	127	La. 183	297
American Sav. Bank & Trust Co. v. Mafridge	60	Wash. 180	265
Anderson v. Hilker	38	Wash. 632	418, 419, 420, 421, 422
Anderson v. Wilmington	2	Penn. (Del.) 28	593
Armstead v. Lounsberry	129	Minn. 34	47
Aylmore v. Seattle	100	Wash. 515	161
Baker v. City of Portland	58	Me. 199	593
Bancroft v. Godwin	41	Wash. 253	629
Barber v. Merriam	11	Allen 322	274
Bardsley v. Truax	64	Wash. 400	50
Bates, Ex parte	20	N. M. 542	566
Baum v. Sweeny	5	Wash. 712	10
Bell v. Mills	80	N. Y. Supp. 34	296, 297
Bender v. Rinker	21	Wash. 633	44
Bendon v. Parfit	74	Wash. 645	52
Bennett v. Oregon - Washington R. & Nav. Co	83	Wash. 64	273
Benson v. Palmer	31	App. D. C. 561	278
Birch v. Abercrombie	74	Wash. 486	550, 551
Black v. Suydam	81	Wash. 279	101
Blanchard v. Puget Sound T., L. & P. Co.	105	Wash. 226	37, 38
Blystone, In re	75	Wash. 286	568

				Page
Boice v. Finance & Guaranty Corp.	127	Va.	563	174
Bookhout v. Vuich	101	Wash.	511	422
Bourne v. Whitman	209	Mass.	155	47
Bowden v. Walla Walla Valley R. Co	79	Wash.	184	38
Boyer v. Price	45	Wash.	667	100
Brace & Hergert Mill Co. v. Burbank	87	Wash.	356	145
Brennon v. Commonwealth	169	Ky.	815	97
Briggle v. Cox	72	Wash.	574	602
Brown v. State	59	Wash.	195	511
Brownell v. Hanson	109	Wash.	447	389
Bryan v. Palmer	83	Kan.	298	50
Bryant v. Palmer	152	N. Y.	412	6
Buchanan's Estate, In re	89	Wash.	172	288, 289
Buckley v. Harkens	114	Wash.	468	551
Buffalo Barb Wire Co. v. Phillips	67	Wis.	129	296
Bullis v. Ball	98	Wash.	342	314
Burlie v. Stephens	113	Wash.	182	46
Burman v. Douglas	78	Wash.	394	209
Calispel Diking Dist. No. 1 v. McLeish	63	Wash.	331	27
Carnego v. Crescent Coal Co	164	Iowa	552	621
Catton v. Reehling	78	Wash.	187	208
Chase v. Smith	35	Wash.	631	419, 420, 421
Chavelle v. Island Gun Club	77	Wash.	304	151
Chepakoff v. National Ben Franklin Fire Ins. Co	161	N. Y. Supp.	283	96
Chicago, Milwaukee & P. S. R. Co. v. Slosser	82	Wash.	467	27
Citizens' Nat. Bank of Crawfordsville v. Lucas	26	Wash.	417	209
City of Cleveland v. Cleveland, C., C. & St. L. R. Co	93	Fed.	113	269
City of Nashville v. Black	142	Tenn.	397	593
Clendenning, Ex parte	22	Okl.	108	566, 568, 570
Coleman v. Larson	49	Wash.	321	51
Columbia & Puget Sound R. Co. v. Moss	44	Wash.	589	334
Commonwealth v. Barry	115	Mass.	146	361
Conroy v. Mather	217	Mass.	91	47
Consolidated Gas Co. of New York v. Newton	267	Fed.	231	114
Coons v. Olympia Light & Power Co.	111	Wash.	677	199

				Page
Cooper v. Hillsboro Garden Tracts	78	Ore.	74	365
Cornelius v. Washington Steam Laundry	52	Wash.	272	147
Cosh-Murray Co. v. Bothell	10	Wash.	314	59
Crosier v. Cudihee	85	Wash.	237	343
Crowe & Co. v. Brandt	50	Wash.	499	55
Crumpton & Walker v. State	43	Ala.	31	542
Curtis v. Moore	152	N. Y.	159	250
Daniels v. Foster	26	Wis.	686	51
Davis v. Seattle	37	Wash.	223	165
Davis & Co. v. Thomas	154	Ala.	279	258
Delano v. La Bounty	62	Wash.	595	551
DeLys v. Powell-Sanders Co.	90	Wash.	31	314
De Mattos v. Jordan	15	Wash.	378	433
Denny v. Palmer	26	Wash.	469	100
Derr v. Chicago, M. & St. P. R. Co.	163	Wis.	234	47
Detamore v. Hindley	83	Wash.	322	687
Devitt v. Puget Sound T., L. & P. Co.	106	Wash.	449	38
Dickie Mfg. Co. v. Sound Constr. & Eng. Co.	92	Wash.	316	265
Dignan v. Spokane County	43	Wash.	419	19
Dillon v. Gray	87	Kan.	129	51
Dormitzer v. German Savings etc. Soc.	23	Wash.	132	167
Duncan's Estate, In re	113	Wash.	165	427
Dunlap v. Rauch	24	Wash.	620	167
Dyer Bros. Golden West Iron Wks. v. Pederson	112	Wash.	390	421
Ehrlick-Harrison Co. v. Cushman	86	Wash.	190	147
Fawkner, Currie & Co. v. Sanitary Fish Co	105	Wash.	88	44
Fender v. McDonald	54	Wash.	130	56
Fennell v. Drinkhouse	131	Cal.	447	637
Fidelity National Bank v. Adams	38	Wash.	75	59
Finn's Estate, In re	106	Wash.	137	285
First Nat. Bank of Everett v. Northwest Motor Co	108	Wash.	167	256
First Security & Loan Co. v. Englehart	107	Wash.	86	402
Fishburne v. Merchants' Bank of Pt. Townsend	42	Wash.	473	403
Fluckiger v. Seattle	103	Wash.	330	594

			Page
Foster v. Commissioners of Cowlitz County	100	Wash. 502	70
French v. C. D. & E. Investment Co.	114	Wash. 416	366
Fuller v. State	100	Miss. 811	571, 572
Gaar, Scott & Co. v. Hill	20	Ky. Law 1325	297
Gabrielson v. Hague Box & Lum. Co.	55	Wash. 342	421
Garey v. Pasco	89	Wash. 382	185
George v. Butler	26	Wash. 456	100
George v. Carstens Packing Co.	91	Wash. 637	551
Giannini, In re	18	Cal. App. 166	566
Gilbert Hunt Co. v. Parry	59	Wash. 646	150
Gilman v. Central Vermont R. Co.	93	Vt. 340	47
Gleason Co. v. Carman	109	Wash. 536	295
Glover v. Richardson & Elmer Co.	64	Wash. 403	551
Goldsby v. Seattle	115	Wash. 566	199
Gooden v. State	35	Ala. 430	541, 542
Gould v. McCormick	75	Wash. 61	421
Graaf v. Vulcan Iron Works	59	Wash. 325	516
Graves, In re	61	Ala. 381	540
Gray v. State	107	Ind. 177	571
Greater Motors Corp. v. Metropolitan Taxi Co.	115	Wash. 451	46, 193
Griffin v. Tacoma	49	Wash. 524	679
Gross v. Bennington	52	Wash. 417	508
Guye v. Guye	63	Wash. 340	288
Hadfield v. Lundin	98	Wash. 657	241
Hale v. City Cab, Carriage & Transfer Co.	66	Wash. 459	342
Hall v. Cowen	51	Wash. 295	150
Ham v. Los Angeles County	189	Pac. 462	593
Hamilton v. Vioue	90	Wash. 618	550
Hamilton Brown Shoe Co. v. Adams	5	Wash. 333	58
Hammond v. Mau	69	Wash. 204	389
Hammons v. Setzer	72	Wash. 550	551
Hanna v. Kasson	26	Wash. 568	100
Harris v. Seattle	118	Wash. 327	38
Hartley v. Lasater	96	Wash. 407	314
Hastings v. Anacortes Packing Co.	29	Wash. 224	159
Hatch v. Hover-Schiffner Co.	101	Wash. 551	330
Healy Lum. Co. v. Morris	33	Wash. 490	410
Heath v. Wylie	109	Wash. 86	38
Heg v. Mullen	115	Wash. 252	139

			Page
Henderson v. State	55	Tex. Cr. 640	528
Herrett v. Puget Sound T., L. & P. Co	103	Wash. 101	38
Hester v. Stine	46	Wash. 469	285
Hodgdon v. Haverhill	193	Mass. 406	6
Hollis v. Drew Theological Seminary	95	N. Y. 166	66
Holly-Mason Hardware Co. v. Schnatterly	111	Wash. 29	13
Horrell v. California etc. Ass'n	40	Wash. 531	55
Howatt v. Clark	112	Wash. 137	187
Hubbard v. Fitzsimmons	57	Ohio St. 436	6
Hutchinson v. Wilson	54	Wash. 410	264
Imperial Candy Co. v. Seattle	93	Wash. 145	595
Irwin v. J. K. Lumber Co	102	Wash. 99	162
Jacobs v. Seattle	100	Wash. 524	162
James v. Lueders	97	Wash. 560	52
Jefferis v. East Omaha Land Co	134	U. S. 178	441
Jenkins v. Carman Mfg. Co	79	Ore. 448	300
Jensen-King-Byrd Co. v. Williams	35	Wash. 161	59
Johnson v. Great Northern Lum. Co.	85	Wash. 16	210
Johnson v. Puget Mill Co	28	Wash. 515	52, 521
Johnson v. Seattle	113	Wash. 487	199, 201
Johnson v. Tacoma Mill Co	22	Wash. 88	355
Johnson v. Upper	38	Wash. 693	521
Joplin & P. R. Co. v. Public Serv. Comm.	267	Fed. 584	114
Jordan v. Duval County	68	Fla. 48	6
Josephs v. Briant	115	Ark. 538	50
Kalez v. Spokane Valley Land etc. Co.	42	Wash. 43	502, 503
Kane v. Northern Central R. Co	128	U. S. 91	83
Kansas City Regal Auto Co. v. Old Colony Ins. Co	187	Mo. App. 514	96
Katterhagen v. Meister	75	Wash. 112	285
Keith v. Peart	115	Wash. 552	389
Kenna v. Calumet, Hammond & Southeastern R. Co	206	Ill. App. 17	511
Keyes v. Sabin	101	Wash. 618	173
Kneff v. Sanford	63	Wash. 503	551
Knust v. Bullock	59	Wash. 141	551
Koch v. Seattle	113	Wash. 583	46
Kraus v. Dowell	119	Wash. 90	653
Krutz v. Gardner	25	Wash. 396	100

				Page
Lancey v. King County	15	Wash.	9	4, 6
Lang v. New York Central R. Co.	225	U. S.	455	46
Lanigan v. Miles	102	Wash.	82	288
Lauridsen v. Lewis	50	Wash.	605	56
Leaman v. Thompson	43	Wash.	579	165
Lewinn v. Murphy	63	Wash.	356	355
Lilly-Brackett Co. v. Sonnemann	50	Wash.	487	209
Lindquist v. Pacific Coast Coal Co.	86	Wash.	408	447
Lloyd v. Northern Pac. R. Co.	107	Wash.	57	551
Lockridge v. Minneapolis & St. L. R. Co.	161	Iowa	74	47
Macale v. Lynch	110	Wash.	444	551
McDonald & Co. v. Johns	62	Wash.	521	247
McEvilla v. Puget Sound Tr., L. & P. Co	95	Wash.	657	38
McGillivray v. Columbia Salmon Co.	104	Wash.	623	341
McHugh v. Slack	11	Wash.	370	147
Malfa v. Crisp	52	Wash.	509	341
Mansfield v. First National Bank	5	Wash.	665	59
Markuson, In re	5	N. D.	180	568, 569
Marsh v. Fisher	69	Wash.	570	288
Marvin v. Yates	26	Wash.	50	445
Maryland Casualty Co. v. Seattle Elec. Co	75	Wash.	430	446
Maskell v. Alexander	91	Wash.	363	551
Meeker v. Gilbert	3	Wash. Terr.	369	167
Meikle v. Cloquet	44	Wash.	513	209
Mendenhall v. Davis	52	Wash.	169	403
Merritt v. Russell & Co	44	Wash.	143	255
Meyer v. Beyer	43	Wash.	368	334
Milburn, In re	9	Peters (U. S.)	704	277
Miller v. Evans	115	Iowa	101	571
Miller v. Moore	83	Ga.	684	296
Miller v. Scarbrough	108	Wash.	646	173
Minor v. Stevens	65	Wash.	423	551
Monroe v. Stayt	57	Wash.	592	264
Moore v. Roddie	103	Wash.	386	475, 551, 552
Moore v. Roddie	106	Wash.	548	551, 555
Moran v. Dickinson	204	Mass.	559	47
Morgan v. Morgan	54	Wash.	406	52
Morris v. Columbia Canal Co.	75	Wash.	483	367
Nabours v. Seattle	113	Wash.	557	199
Nashua Trust Co. v. Edwards Mfg. Co.	99	Iowa	109	250

			Page
National Bank of the Republic v. Hines	112	Wash.	352
Neal v. State	104	Ga.	509, 566, 571
Nelson v. Davis	102	Wash.	313
Neterer v. State	98	Wash.	635
Nettleton v. Howe	81	Wash.	32
Newcomb v. Boston Protective Department	146	Mass.	596
Newcomb, In re	56	Wash.	395, 544, 568
New Orleans v. United States	10	Peters (35 U. S.)	662
Nicholls v. The State	5	N. J. L.	626
Nixa Canning Co. v. Lehmann-Higginson Grocer Co	70	Kan.	664
Noble v. Douglas	274	Fed.	672
North Star Trading Co. v. Alaska-Yukon-Pacific Exposition	68	Wash.	457, 339, 342
O'Donnell v. McCool	89	Wash.	537
Olsen v. Veness	105	Wash.	599
Olson v. Clark	111	Wash.	691
Olson v. Snake River Valley R. Co.	22	Wash.	139
Olson v. Title Trust Co	58	Wash.	599
O'Neil v. Cheatwood	127	Va.	96
Pacific Mut. Life Ins. Co. of California v. Munson	115	Wash.	119
Paine v. Port of Seattle	70	Wash.	294
Parent, In re	112	Wash.	620
Parker v. Wilson	179	Ala.	361
Payne v. Freer	91	N. Y.	43
People v. Brown	54	Mich.	15
People v. Goodrich	149	N. Y. Supp.	406
People v. Gordon	194	Ill.	560
People v. Supervisors, etc	28	Cal.	228
People v. Sybisloo	184	N. W. (Mich.)	410
People ex rel. Dunnigan v. Webster	36	N. Y. Supp.	745
People ex rel. Forsyth v. Court of Sessions of Monroe County	141	N. Y.	288
Peoples Trust Co. v. Tonkonogy	128	N. Y. Supp.	1055
Percy v. Miller	115	Wash.	440
Peter v. The State	3	How. (Miss.)	433
Peters v. Casualty Co	101	Wash.	208
Peters v. Lewis	33	Wash.	617
Peterson v. Morris	104	Wash.	507, 338, 343
Peterson v. Pallis	103	Wash.	180
Petticrew v. Greenshields	61	Wash.	614

				Page
Phillips v. Port Townsend Lodge F. & A. M.	8	Wash.	529	264
Plath v. Mullins	87	Wash.	403	637
Potter Mfg. Co. v. A. B. Meyer & Co.	171	Ind.	513	150
Pratt v. Niagara Fire Ins. Co.	113	Wash.	347	221
Purdy v. Sherman	74	Wash.	309	551, 552
Rainier Heat & Power Co. v. Seattle	113	Wash.	95	593
Ralph v. Lomer	3	Wash.	401	264
Ralton v. Sherwood Logging Co.	54	Wash.	254	445
Rankin v. Yoran	72	Ore.	224	6
Raymond v. Bales	26	Wash.	493	100
Raymond v. Hattrick	104	Wash.	619	52
Reese v. Murnan	5	Wash.	373	187
Robbins v. Wyman, Partridge & Co.	75	Wash.	617	165
Robinson v. State	113	Ind.	510	96
Rust, In re	181	Cal.	73	488
Rutaced Co., In re	122	N. Y. Supp.	454	58
Ryno v. Snider	58	Wash.	457	162
St. Joseph R. Light, Heat & Power Co. v. Public Serv. Comm.	268	Fed.	267	114
Samuels v. Hiawatha Holstein Dairy Co.	115	Wash.	343	552
Scandinavian-American Bank v. Johnston	63	Wash.	187	509
Schooley v. Chehalis	84	Wash.	667	679
Scott v. Tacoma	81	Wash.	178	679
Seattle v. Pearson	15	Wash.	575	672, 673
Seattle Brewing & Malting Co. v. Donofrio	59	Wash.	98	210
Seattle Elec. Co. v. Seattle	78	Wash.	203	689
Seattle Nat. Bank v. Ally	66	Wash.	610	248, 251
Seattle Nat. Bank v. Carter	13	Wash.	281	54
Segerstrom v. Lawrence	64	Wash.	245	314
Selde v. Lincoln County	25	Wash.	198	10
Seymour v. Ellensburg	81	Wash.	365	679
Shaw v. Benesh	37	Wash.	457	55
Shenandoah Valley Loan & Trust Co. v. Murray	120	Va.	563	274
Sherlock v. Denny	28	Wash.	170	288
Shimoda v. Bundy	24	Cal. App.	675	47
Simon v. Levy	114	Wash.	556	185
Slattery, Ex parte	163	Cal.	176	566

			Page
Smith, In re	4	Colo. 532	542
Smyth v. Ames	169	U. S. 466	116
Snodgrass v. State	67	Tex. Cr. 615	566
Solice v. State	21	Ariz. 592	138
Spencer v. State	125	Tenn. (17 Cates) 64	568, 569, 571, 572
State v. Abbott	87	S. C. 466	571, 572
— v. Aker	54	Wash. 342	624
— v. Baruth	47	Wash. 283	140
— v. Bodeckar	11	Wash. 417	543
— v. Bokien	14	Wash. 403	130
— v. Bonham	93	Wash. 489	483, 488
— v. Boone	65	Wash. 331	279
— v. Brooks	89	Wash. 427	453
— v. Brown	37	Wash. 106	511
— v. Bryant	90	Wash. 20	292
— v. Campbell	99	Wash. 502	528
— v. Carpenter	32	Wash. 254	625
— v. Carroll	55	Wash. 588	561
— v. Craddick	61	Wash. 425	279
— v. Cunningham	51	Mo. 479	542
— v. Davis	38	N. J. L. 176	97
— v. Denham	30	Wash. 643	616
— v. Duncan	7	Wash. 336	453
— v. Fenton	30	Wash. 325	537
— v. Fetterly	33	Wash. 599	452
— v. Gay	82	Wash. 423	613
— v. Gibbons	118	Wash. 171	309
— v. Gibson	115	Wash. 512	666, 667
— v. Gilluly	50	Wash. 1	568
— v. Guy	82	Wash. 423	446
— v. Hals	90	Wash. 540	160
— v. Heaton	21	Wash. 59	461
— v. Hodoff	88	Wash. 413	613
— v. Hill	45	Wash. 694	453
— v. Ide	35	Wash. 576	470, 471
— v. Intoxicating Liquors	95	Maine 140	511
— v. Jones	114	Wash. 144	360
— v. King	50	Wash. 312	532, 533
— v. Littooy	52	Wash. 87	511
— v. Lorenzy	59	Wash. 308	446
— v. Lyle	105	Wash. 435	447
— v. McDonald	116	Wash. 668	451
— v. McGilvery	20	Wash. 240	278
— v. Maddaus	137	Minn. 249	96, 97
— v. Mallahan	65	Wash. 287	566, 568

			Page
State v. Melvern	32 Wash.	7	453
— v. Miller	72 Wash.	154	537, 545
— v. Morden	87 Wash.	465	453, 533
— v. Moss	73 Wash.	430	532
— v. Newkirk	49 Mo.	472	542
— v. O'Hara	17 Wash.	525	456
— v. Parker	25 Wash.	405	445
— v. Peck	51 Mo.	111	542
— v. Peeples	71 Wash.	451	453
— v. Pepoon	62 Wash.	635	624
— v. Pettilla	116 Wash.	589	666, 667
— v. Poole	64 Wash.	47	537
— v. Postal Tel. Cable Co.	101 Wash.	630	203
— v. Ross	85 Wash.	218	626
— v. Rozum	8 N. D.	548	361
— v. Schrock	92 Wash.	69	613
— v. Seifert	65 Wash.	596	282
— v. Sexton	37 Wash.	110	511
— v. Sigler	116 Wash.	581	451
— v. Smith	103 Wash.	267	132, 606
— v. Smokalem	37 Wash.	91	624
— v. Sommerville	21 Me.	14	561
— v. Stewart	52 Wash.	61	125
— v. Stone	66 Wash.	625	626
— v. Thompson	48 Wash.	683	511
— v. Trexler	4 N. C.	90	561
— v. White	113 Wash.	416	624
State ex rel. American Piano Co. v. Superior Ct.	105 Wash.	676	106
— Board of Com'rs v. Clausen	95 Wash.	214	5
— Brown v. Brinker	114 Wash.	47	672, 673
— Brown v. McQuade	36 Wash.	579	649
— Brown v. Superior Ct.	87 Wash.	524	377
— Brown v. Superior Ct.	15 Wash.	314	377
— Carlson v. Superior Ct.	107 Wash.	228	373, 374
— Clapp v. Urquhart	108 Wash.	299	649
— Clemmer & J. Co. v. Turner	93 Ohio St.	379	6
— Davis & Co. v. Superior Ct.	95 Wash.	258	635
— Dawson v. Sapp	87 Kan.	740	568, 569
— Ellertsen v. Home Tel. & Tel. Co.	102 Wash.	196	111
— Foley v. Ramsey	116 Wash.	541	8, 9
— Galbraith v. Superior Ct.	59 Wash.	621	411
— Gillespie v. Kuykendall	117 Wash.	415	236, 241, 242
— Harris v. Superior Ct.	42 Wash.	660	410

			Page
State ex rel. Kettle Falls Power etc. Co. v. Superior Ct..	46	Wash. 500	412
— Ladd & Tilton Bank v. Superior Ct.	117	Wash. 544	670
— Langley v. Superior Ct...	73	Wash. 110	670
— McBride v. Superior Ct...	103	Wash. 409	321
— McCormick v. Superior Ct.	43	Wash. 91	28, 29
— Matson v. Superior Ct....	42	Wash. 491	28
— Meredith v. Tallman.....	24	Wash. 426	79
— Milton v. Dickenson.....	44	Fla. 623	6
— Mohr v. Superior Ct.....	54	Wash. 225	670, 671
— Mountain Timber Co. v. Superior Ct.	77	Wash. 585	409
— Murphy v. Brown.....	83	Wash. 100	377, 671, 672
— Race v. Cranney.....	30	Wash. 594	649
— Schafer v. Spokane.....	109	Wash. 360	688, 690
— Shattuck v. French.....	82	Wash. 330	537
— Stephens v. Superior Ct...	111	Wash. 205	373
— Tacoma Industrial Co. v. White River Power Co.	39	Wash. 648	410
— Taro v. Everett.....	101	Wash. 561	650
— Thompson v. State Board of Dental Examiners...	48	Wash. 291	511
— Vanderveer v. Gormley...	53	Wash. 543	79
— Webster v. Superior Ct...	67	Wash. 37	111, 690
— Yeargin v. Maschke	90	Wash. 249	10
— Young v. Superior Ct....	43	Wash. 34	671
Stewart v. Bank of Endicott....	82	Wash. 106	637
Stitt v. Spengel House Furnishing Co.	58	Colo. 559	254
Stone v. Seattle.....	30	Wash. 65	19
Strickler, In re.....	51	Kan. 700	568, 570
Stueding v. Seattle Elec. Co....	71	Wash. 476	199
Sutton v. Snohomish.....	11	Wash. 24	19
Sutton & Co. v. Coast Trading Co.	49	Wash. 694	340
Swain v. Spokane.....	94	Wash. 616	19
Tackett v. Taylor County.....	123	Iowa 149	593
Tekoa v. Reilly	47	Wash. 202	470
Terry v. King County.....	43	Wash. 61	6
Tibbals v. Iffland.....	10	Wash. 451	265
Thompson v. Washington Nat. Bank	68	Wash. 42	435
Thompson, In re.....	36	Wash. 377	511
Thurston County v. Tenino Stone Quarries	44	Wash. 351	470

			Page
Turner v. Caldwell	15	Wash. 274	255, 258
Twichell v. Seattle	106	Wash. 32	675, 676, 678, 680
Uhler v. Olympia	87	Wash. 1	679
United States v. Allis	73	Fed. 165	262
United States v. Burr	1	Burr's Trial, 79 (Fed. Cas. No. 14,692b)	540, 542
United States, Ex parte	242	U. S. 27	570
United States v. Morris	14	Peters (U. S.) 464	125
United States v. Smith	2	Cranch, C.C. (U.S.) 111	542
United States v. Wilson	46	Fed. 748	568, 569
United States v. Wiltberger	5	Wheat. (U. S.) 76	125
Velikanje v. Dickman	98	Wash. 584	52
Vickers v. Michinery Warehouse etc. Co	111	Wash. 576	185
Volz v. Zang	113	Wash. 378	287
Wagoner v. Warn	88	Wash. 688	447
Watson v. Glover	21	Wash. 677	167
Weatherwax v. Grays Harbor County	116	Wash. 212	69
Weatherwax Lum. Co. v. Ray	38	Wash. 545	433
Webb v. Stephenson	11	Wash. 342	367
Webb, In re	89	Wis. 354	566, 568, 570
Welch v. Town of Geneva	110	Wis. 388	593
Wells v. Western Union Tel. Co.	144	Iowa 605	511
Wharton v. Tacoma Fir Door Co.	58	Wash. 124	626
Wharton v. Warner	75	Wash. 470	578
White v. Krutz	37	Wash. 34	100
White Mfg. Co. v. De La Vergne Refrigerating Mach. Co	84	N. Y. Supp. 192	296
Wick v. Gunn	169	Pac. (Okl.) 1087	300
Willcox v. Consolidated Gas Co.	212	U. S. 19	114
Williamson v. Hallet	108	Wash. 176	333
Wilson v. Fraser	67	Wash. 347	13
Wilson v. Wilson	26	Ore. 251	405
Windt v. Banniza	2	Wash. 147	44
Wodnik v. Luna Park Amusement Co.	69	Wash. 638	516
Wood, Curtis & Co. v. El Dorado Lum. Co.	153	Cal. 230	150
Woody v. Wagner	89	Wash. 429	168
Worden v. Worden	96	Wash. 592	52
Worthy v. Arctic Co	114	Wash. 435	72
Wusthoff v. Schwartz	32	Wash. 337	628, 629
Zabriskie v. Central Vt. R. Co.	131	N. Y. 72	296
Zinn v. Knopes	111	Wash. 606	51

STATUTES
CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.

Page

Art. 1 § 6..... 4
" 1 § 9..... 452
" 1 § 16..... 409, 413
" 1 § 21..... 544
" 1 § 29..... 544
" 3 § 9..... 565
" 3 § 11..... 565
" 7 §§ 1, 2..... 469
" 7 § 5..... 468
" 11 § 8..... 79
" 11 § 11..... 687
" 11 § 12..... 466
" 20 § 1..... 319
" 21 § 1.....409, 412

HILL'S CODE.

Sections 462, 463.....207, 208

REMINGTON AND BALLINGER'S CODE

Section 1211..... 50

PIERCE'S CODE.

Section 1214, 1215..... 676
" 1217..... 677
" 1432..... 285
" 1679..... 9
" 1794..... 462
" 1914..... 247
" 1931 *et seq*..... 510
" 2909..... 237
" 2990..... 239
" 2992, 2993..... 238
" 3473–6..... 299
" 3488..... 23
" 3727 *et seq*..... 485

PIERCE'S CODE—*Continued.*

Page

Section 3765-152 4
" 4356–4360....340, 341, 344
" 4513..... 527
" 4520..... 526
" 4527..... 527
" 5038.....223, 225
" 5039..... 226
" 5277..... 319
" 5278..... 320
" 5293, 5294..... 321
" 5619..... 115
" 6157..... 15
" 6169..... 17
" 6835..... 17
" 7290.....281, 537, 632, 669
" 7379..... 104
" 7418, 7419.....27, 669
" 7722..... 186
" 7723..... 605
" 7746..... 42
" 7811..... 609
" 7934..... 598
" 7970.....333, 334
" 7999..... 104
" 8039..... 544
" 8040..... 543
" 8163..... 432
" 8163, 8164..... 208
" 8166.....161, 162
" 8180..... 162
" 8225..... 26
" 8513..... 624
" 8543..... 220
" 8715..... 564

PIERCE'S CODE—*Continued.*

	Page
Section 8725	606
" 8944	523, 559
" 9141	538, 539
" 9144	540
" 9156	538
" 9158	539
" 9159	539
" 9162	277
" 9214	605
" 9218	453
" 9241	453
" 9273	531
" 9347	293
" 9603	291
" 9706	145
" 9709	249
" 9710	147, 149
" 9723	148
" 9727	220
" 9748	254
" 9759	173
" 9761	172

REMINGTON'S CODE.

Section 159, subd. 2	161
" 159, subd. 3	162
" 173	162
" 206	220
" 349	624
" 383	609
" 399, subds. 1, 2, 3, 4, 7, 8	26
" 459	432
" 459, 460	208, 209
" 620	598
" 647 *et seq*	104
" 648, subd. 9	104
" 680 *et seq*	105
" 812, subd. 3	334
" 812, subd. 6	333, 334
" 1002	27, 28, 669
" 1003	27
" 1075	544

REMINGTON'S CODE—*Continued.*

	Page
Section 1076	543
" 1132	249
" 1133	145
" 1134	147, 149
" 1147	148
" 1161	220
" 1211	186
" 1212	605
" 1716	671
" 1716, subd. 1	282
" 1716, subd. 3	632, 635
" 1716, subd. 7	281, 282, 537, 669
" 1957	291
" 2060	531, 532
" 2103	538, 539
" 2105, 2106	539
" 2109	277
" 2148	453, 605
" 2152	453
" 2231	293
" 2290	606
" 2310	538, 539
" 2313	540
" 2392	558
" 2601	523, 559
" 3659	173
" 3662	172
" 3668	254
" 3693	526
" 3701	527
" 3703	527
" 3831–5	4
" 3909	9
" 3966	462
" 4226–1	69
" 4481	694
" 4486	694
" 4493	694
" 4532	694
" 4537	223, 225
" 4538	226
" 4538, 4539	694

REMINGTON'S CODE—*Continued.*

	Page
Section 5290	42
" 5404 to 5415	319
" 5406	320, 321, 322
" 5408	321
" 5410	321
" 5562–33	550
" 5879–1 *et seq*	15
" 5879–12	17
" 5879–14	18
" 5897	17
" 5915	285
" 6059–2	237, 239
" 6059-83, subdi. 5, 6	239, 240, 241
" 6059–83, subd. 13½	239, 240, 241
" 6059–85	238
" 6059–86, subd. 5	238
" 6389	689
" 6604–6	299
" 6604–20	23
" 7183	7
" 8005, 8006	676
" 8008	677
" 8369-8373	340, 341, 344
" 8386 *et seq*	485
" 8412 *et seq*	510
" 8626–34	112
" 8626–92	115, 117
" 8781	247
" 8805	334
" 9192	427

REMINGTON'S COMPILED STATUTES.

	Page
Section 1970	512
" 2280	563, 564
" 2392	558
" 2601	559
" 2601–1	559
" 3259	124, 261
" 3693-3827	527
" 3829	527
" 3996	4

REMINGTON'S COMPILED STATUTES —*Continued.*

	Page
Section 4135	463
" 4405	69
" 4776	694
" 4782	694
" 4789	694
" 4829	694
" 4835, 4836	694
" 4837	694, 695
" 4838, 4839	695
" 4840	694
" 4940	647
" 5146	75
" 5826	42
" 6001	321
" 6004	321
" 6390	382, 686
" 6391	237, 240
" 6397	688
" 6784	17
" 6824	18
" 7033	237
" 7045	221
" 7128	239
" 7130	238
" 7131	238
" 7354	409
" 7361	478
" 7364–7377	479
" 7396	504
" 7695	203
" 7798	299
" 8469	7
" 8488, 8489	677
" 8491	678
" 10008	486, 487
" 10056	486
" 10071	486
" 10072	487
" 10098	486
" 10112	486
" 10148 to 10151	482
" 10159	482, 486

REMINGTON'S COMPILED STATUTES —*Continued.*

Page

Section 10370 112
" 10441..... 117
" 10596..... 247
" 10621..... 334
" 10761..... 321
" 10814..... 319
" 10817..... 321
" 11210..... 427
" 11242 *et seq*..... 465
" 11246..... 466

SESSION LAWS.

1857–8, p. 13, § 6..... 462
1886, p. 39..... 104
1891, p. 95, § 5..... 463
1893, p. 82, § 1.....462, 463
p. 95, § 1, subd. 1..... 106
p. 95, § 1, subds. 1, 2..... 105
p. 95, § 2..... 105
1895, p. 271.....69, 70
p. 304.....69, 70
1897, p. 52..... 209
p. 52, §§ 1, 2, 3..... 208
p. 53, § 4..... 208
1909, p. 649..... 17
p. 677..... 485
p. 688, § 20..... 485
p. 850..... 486
p. 855, § 13..... 486
1911, p. 118, § 12..... 17
p. 561, § 34.....111, 112
p. 601..... 109
p. 601, § 92.....115, 116
p. 604, § 92.....116, 117
1913, p. 395.....693, 694, 697
p. 395, § 1.....695, 696
p. 396, § 2..... 695
p. 396, § 3.....695, 696
p. 491, § 5..... 17
p. 611.....69, 70
1915, p. 227..... 239

SESSION LAWS—*Continued.*

Page

1915, p. 589, § 13½..... 221
1917, p. 297, § 52.....124, 261
p. 448, § 4..... 408
p. 452, § 11..... 478
pp. 454-459, § 14-26..... 478
p. 468..... 18
p. 469, § 4..... 18
p. 517.....69, 70
p. 595, § 3..... 427
1919, p. 4..... 486
p. 17, § 19..... 486
p. 17, § 20..... 487
p. 18..... 486
p. 57..... 646
p. 57, § 1.....646, 647
p. 64..... 486
p. 131..... 558
p. 131, § 1..... 559
p. 136, § 3..... 203
p. 144, § 4..... 504
p. 372.....486, 487
p. 373, § 3..... 487
p. 396, § 1.....481, 482
p. 396, §§ 2, 3..... 482
p. 397, § 4..... 482
p. 400, §§ 5, 6..... 482
p. 401, § 7..... 484
p. 405, § 15.....
..481, 482, 483, 484, 486, 487
p. 709..... 512
1921, p. 12, § 2..... 321
p. 20 109
p. 34, § 56 319
p. 35, § 59 321
p. 179, § 2 75
p. 180, § 4 .....75, 77, 78
p. 204 .....563, 564
p. 338 .....381, 686, 689
p. 340, § 3 689
p. 341, § 4 .....382, 686, 689
p. 341, § 5.236, 237, 239, 240, 241
p. 344, § 11 687

SESSION LAWS—*Continued.*

Page

1921, p. 581, § 2..... 3
p. 605..... 3
p. 646.....69, 70
p. 674..... 465
p. 676, § 5.....466, 469
p. 678, § 10.....467, 468

ORDINANCES.

Everett, No. 1,260, § 171.... 633
Seattle, No. 22,839.....591, 595

ORDINANCES—*Continued.*

Page

Seattle, No. 36,792.....591, 595
Seattle, No. 37,434, §§ 93, 167 46
Seattle, No. 39,025..... 675
Seattle, No. 39,720, § 46.... 349
Seattle, No. 39,720, § 60.... 272
Seattle, No. 41,695, § 72.... .....472, 473, 475
Seattle, No. 41,886..... 13
Spokane, No. C2403, § 3...36, 37

ERRATA

Page 46, line 8 from bottom, for *15* read *115*

Page 148, line 16 from bottom, for § *9722* read § *9723*

Page 283, 2d syllabus, line 4, for *community* read *separate*

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 16776. *En Banc.* March 3, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Maurice Thompson, as Adjutant General, Respondent,* v. ARTHUR W. BURCH, *as Auditor of the City of Spokane, Appellant.*[1]

STATES (25)—APPROPRIATIONS—"CAPITAL OUTLAYS"—POWERS OF OFFICERS—IMPROVEMENTS TO ARMORY. Under Laws 1921, p 581, § 2, defining capital outlays by the state as those relating to the purchase of property and the making of new improvements, and the general appropriation act (Laws 1921, p. 605), the adjutant general is vested with authority and discretion to make an addition to an armory previously established by legislative enactment.

MUNICIPAL CORPORATIONS (482, 484)—INDEBTEDNESS—POWERS—CORPORATE PURPOSES—CONSTRUCTION OF ARMORY—CONSTITUTIONAL AND STATUTORY PROVISIONS. Rem. Code, § 3831-5, authorizing cities to expend money for payment in whole or in part for an armory site is not violative of Const., art. 1, § 6, prohibiting indebtedness for other than strictly a municipal purpose; since a state armory constitutes a local benefit, under Rem. Code, § 7183, which authorizes the calling out of the National Guard in the event of insurrection, rebellion, invasion, tumult, riot, resistance to law or process or breach of the peace occurring in the vicinity of any station of such organization. [See Rem. Comp. Stat., §§ 3996, 8469.]

SAME (482, 484). Where a city makes an appropriation for an armory building under legislative authority, it is exercising functions conferred by law, and its action is equivalent to the performance of a mandatory duty required by the legislature.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered August 30, 1921,

[1]Reported in 204 Pac. 785.

in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to compel the issuance of a city warrant. Affirmed.

J. M. Geraghty and *Alex M. Winston,* for appellant.

The Attorney General, C. A. Orndorff, and *Nat U. Brown,* for respondent.

MAIN, J.—The purpose of this action was to require the auditor of the city of Spokane to issue a warrant drawn upon the treasury of the city for the sum of $7,500. To the complaint the auditor interposed a demurrer, which was overruled. He thereupon elected not to plead further and that he would stand upon his demurrer. A judgment was entered directing that a writ of mandate issue requiring the auditor to issue a warrant as prayed for. From this judgment, the auditor appeals.

The facts as stated in the complaint may be summarized as follows: The Adjutant General of the state of Washington, by virtue of his office, has and exercises control and management of the property of the state devoted to the use of its armed forces, and the armory of the city of Spokane is devoted to such use. By reason of the fact that the public welfare, peace and security demand a larger number of troops in the city of Spokane than has heretofore been necessary, a substantial addition to the armory there located is necessary, and this will require the acquisition of real property adjacent to the present site. The city of Spokane, by ordinance passed by the city council on May 16, 1921, appropriated the sum of $7,500 for the purpose of aiding in the purchase of land necessary to be acquired for making the improvement to the armory, and thereafter the appellant, the city auditor, refused to issue a warrant drawn upon the treasury

for the sum named. It was to compel the issuance of this warrant that the action in mandamus was instituted.

The appellant makes two points: first, that the legislature has not authorized an appropriation for such an armory, and that therefore the city is not authorized to issue the warrant; and second, that even if an appropriation has been made by the legislature, the city council cannot expend the funds of the city, because the legislature has no power to authorize such appropriation for the purpose mentioned. In the general appropriation act, Laws of 1921, p. 605, under the heading for the state military department, appropriations are made, one of which is "Capital Outlays, $151,000." In § 2 of the appropriation act, Laws of 1921, p. 581, Capital Outlays is defined: "The first (outlay) relates to the purchase of property, buildings, land and equipment and the making of new improvements." Under this definition the military authorities of the state are vested with the discretion as to what buildings shall be added to by way of improvement or additional construction. Until the appropriation was authorized, the city would have no power to purchase land for an addition to the armory. The appropriation being made for the military department, the Adjutant General, by virtue of his office, having exercise of the control and the management of the property of the state devoted to the use of its armed forces, was authorized to make the addition to the armory. The question here is not whether the Adjutant General has the right to locate an armory not yet established and expend the funds therefor, but simply whether he is vested with the discretion to make an improvement or addition to an armory previously established by legislative enactment.

The second question is whether the city, even though authorized by the legislature, has power to expend money for armory purposes. Under Rem. Code, § 3831-5 [Rem. Comp. Stat., § 3996] (P. C., § 3765-152), any city or county in the state is authorized and empowered to expend money from its current expense fund in payment, in whole or in part, for an armory site, whenever the legislature of the state shall appropriate money for, or authorize the construction of, such armory within such city or county for use of the National Guard which may be stationed within such city or county. The constitution of the state provides that the municipal authorities are vested only with authority to assess and collect taxes for corporate purposes. The appellant argues that the construction of an armory is not a corporate purpose and that, therefore, under the constitution, the proposed expenditure is unlawful. In *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, an action was brought to restrain the county officers from proceeding under an act by the legislature to condemn land for a right of way for a ship canal to connect Lakes Union and Washington, in King county, with the waters of Puget Sound, which undertaking was projected by the Federal government. It was contended in that case that the act was obnoxious to the provisions of § 6, of art. 1, of the constitution, which prohibits a county from incurring a debt for any other than a strictly county purpose. It was held that, since the benefits resulting from the improvement would be largely local, notwithstanding the fact that the improvement was projected by the Federal government and would be of great general benefit, the local benefit would sustain the right of the county to levy a tax to pay for the improvement. It was there said:

"It is next insisted that the act is obnoxious to the provisions of section 6, article 8, of the constitution, which prohibits a county from incurring debt for any other than strictly county purposes, it being contended that the tax to be levied in the prosecution of said undertaking is not for a county purpose, but that it is for a state or federal purpose. But it is beyond question that the proposed undertaking is a public improvement. It is entirely within the limits of King county, and is for the purpose of connecting two large public waterways with the Pacific ocean, and it seems to us that such a canal can more properly be considered a public improvement than a railway for the construction of which it is well settled that aid may be granted by a municipality when authorized to do so by the legislature, there being no constitutional prohibition. The word 'strictly' lends little or no additional meaning to the provision. It could not have been intended thereby to limit counties to ordinary running expenses, and a canal may be as strictly a county purpose as a highway or a bridge, etc. It is apparent that the benefits resulting from this particular improvement will be largely local, notwithstanding the fact that it may also be of great general benefit, and it results that the purpose of the tax is local as well as public."

The holding in that case would be sufficient to authorize the city to make the expenditure involved in this case, providing the erection of an armory in a municipality confers local benefit, were it not for the doubt cast upon the decision by some language used in the case of the *State ex rel. Board of Commissioners v. Clausen*, 95 Wash. 214, 163 Pac. 744, where it was said:

"As we now view it, we would not now hold that building an armory was exercising corporate powers for purely county purposes. It seems to us that the building of an armory falls within those higher and sovereign powers which the state exercises for the protection and welfare of all its citizens, and that among the governmental powers exercised by a sovereign

state there are none higher than those which it exercises for the public safety and general welfare of the state."

Under the doctrine there announced, if the right to expend money for an armory could not be sustained on the ground that there was resultant local benefit, as in the case of the ship canal, *Lancey v. King County, supra,* it nevertheless could be sustained upon the theory that the state in authorizing it exercised its sovereign power. The right of a municipality to levy a tax and expend money for an armory erected within its corporate limits for the use of the National Guard, which is a state organization, has generally been sustained on the theory that there was a resultant local benefit. *Hodgdon v. Haverhill,* 193 Mass. 406, 79 N. E. 830; *Rankin v. Yoran,* 72 Ore. 224, 143 Pac. 894; *Bryant v. Palmer,* 152 N. Y. 412, 46 N. E. 851; *People v. Supervisors, etc.,* 28 Cal. 228.

In *Hubbard v. Fitzsimmons,* 57 Ohio St. 436, 49 N. E. 477 and *State ex rel. Milton v. Dickenson,* 44 Fla. 623, 33 South. 514, 60 L. R. A. 539, the supreme courts, respectively, of Ohio and Florida took the opposite view. In a later case, however, *State ex rel. Clemmer & J. Co. v. Turner,* 93 Ohio St. 379, 113 N. E. 327, the Ohio supreme court sustained the right of the city to expend money for an armory to be located within its corporate limits, on the theory that in that particular case the city of Akron would receive a direct benefit in the use of the building to be erected. The Florida supreme court, in a later case, *Jordan v. Duval County,* 68 Fla. 48, 66 South. 298, sustained the right of a municipality to expend money for an armory, on the theory that the legislature in providing for such armory had determined in the act that its erection would promote a county purpose. In *Terry v. King County,* 43 Wash.

61, 86 Pac. 210, 9 Ann. Cas. 1170, it was held that an act authorizing the counties of King, Pierce and Spokane to create an indebtedness for the purpose of acquiring sites for the construction of state armories was a special act, and for this reason could not be sustained. That case does not hold that the construction of an armory, even though it confers a local benefit, does not satisfy the requirement of the constitution as to the expenditure of money by a municipality for corporate purposes. It can hardly be doubted that in this case the construction of an armory, or an addition thereto, in the city of Spokane confers a local benefit. In addition to the reasons ordinarily given for sustaining such acts on the theory of a resultant local benefit, there is a statute, § 7183 of Remington's 1915 Code, which provides, among other things, that in the event of insurrection, rebellion, invasion, tumult, riot, resistance to law or process or breach of the peace occurring in the vicinity of the station of any organization or organizations of the National Guard of Washington, that such organization may, upon the conditions there specified, be ordered out to suppress such insurrection, riot, resistance to law, and so forth. [Rem. Comp. Stat., § 8469.]

There is some argument to the effect that the authorizing act of the legislature is only permissive and not mandatory, but it does not seem to us that this is a material consideration. The city, in attempting to make the appropriation, is exercising functions conferred upon it by law, and the situation is the same as though it were performing a mandatory duty required by the legislature.

The judgment will be affirmed.

PARKER, C. J., FULLERTON, HOLCOMB, TOLMAN, and HOVEY, JJ., concur.

[No. 16879. Department One. March 8, 1922.]

In the Matter of the Establishing of DRAINAGE DISTRICT No. 10, OF KING COUNTY.

HENRY J. BENHAM *et al., Appellants,* v. R. J. MCLAUGHLIN *et al., Respondents.*[1]

APPEAL (18, 30)—COUNTIES (22)—DECISIONS APPEALABLE—DISCRETION. The action of the board of county commissioners in ordering the establishment of a drainage district upon application therefor and in refusing a rehearing thereafter, being an exercise of the discretion reposed in the board, is not reviewable on appeal.

DRAINS (9)—PROCEEDINGS FOR ESTABLISHMENT—BONDS. Failure of petitioners for the establishment of a drainage district to give the bond required by the county commissioners does not defeat the jurisdiction of the board to order the district established.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered April 2, 1921, dismissing an appeal from an order of the board of county commissioners establishing a drainage district. Affirmed.

Elias A. Wright, Sam A. Wright, Jay C. Allen, and *S. H. Steele,* for appellants.

Malcolm Douglas and *Howard A. Hanson,* for respondents.

TOLMAN, J.—Another branch of this controversy was before this court in *State ex rel. Foley v. Ramsey,* 116 Wash. 541, 199 Pac. 978, and reference to that case may be had for a statement of the facts.

As stated in the *Foley* case, respondents there, who are the appellants here, appealed to the superior court for King county from the order of February 9, 1920, made by the board of county commissioners establishing drainage district No. 10 of King county. This

[1]Reported in 204 Pac. 1050.

appeal is from a judgment of the superior court entered April 2, 1921, on motion of respondents, dismissing that appeal.

The parties here seem to have each exactly reversed the position which they sought to maintain in the *Foley* case. There we find that the respondents here were contending that mandamus would not lie because the remedy, if any, was by appeal, and the present appellants there argued, "In this case, however, these appellants made away with the objections that were filed by these relators and destroyed the only record on which they could base an appeal, and now want to say to this court that appeal will lie from the order establishing the district." However, since we, and not counsel for the litigants, must decide the case, it is useless to "appeal from Phillip drunk to Phillip sober."

The statute authorizing appeals from orders made by the board of county commissioners, Rem. Code, § 3909[1] (P. C. § 1679), reads: "Any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county." It may be assumed that "any person" means any person interested in the matter at issue, and there is no contention that appellants did not have a sufficient interest in the subject-matter to give them the right to appeal. It would therefore appear that the question here to be decided is, what questions will be reviewed by the courts on such an appeal? The learned trial court seems to have been of the opinion that the court could inquire only into the jurisdiction of the board, the regularity of the proceedings had before it, and fraud or grossly arbitrary action appearing on the face of the record; or, stated in other words, in effect held that the court could not examine into and control the exercise of discretion by the county board. This

[1]Note: See Rem. Comp. Stat., § 4076.

principle seems to have been early recognized by this court and uniformly followed. In *Baum v. Sweeny*, 5 Wash. 712, 32 Pac. 778, in upholding the judgment of the trial court setting aside on appeal an order made by a county board, it was specifically pointed out that in the matter complained of the board had no discretion, but simply a ministerial duty to perform; and treating the appeal as in effect a mandamus proceeding, the board was directed to perform such duty. From the language used, the inference is strong that, had the matter involved been one upon which the county board might exercise discretion, the result would have been otherwise.

In *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192, it is said:

"What are the limitations upon appeals to the superior court from the decision of the board of county commissioners? The superior court exercises only judicial power; hence appeals from the board of county commissioners to the superior court must be limited to such cases as require the exercise of purely judicial power, and therefore when the board of county commissioners exercises political power, or legislative power, or administrative power, or discretionary power, or purely ministerial power, no appeal involving a trial *de novo* will lie. *Fulkerson v. Stevens*, 31 Kan. 125 (1 Pac. 261). It may be that under an appeal from such an order or decision, the superior court would have power to inquire into questions of jurisdiction, the regularity of the proceedings of the board of commissioners, and its compliance with the forms of law, but not to try the case as if originally brought in that court."

The *Selde* case was approved and followed in *State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 155 Pac. 1064, where, after quoting from the *Selde* case, it is said:

"If the action of the board of county commissioners was arbitrary or capricious, this fact can only be determined by a trial *de novo* in the superior court. In no other way could the facts which show such arbitrary or capricious conduct, if in fact it existed, be made to appear. These facts were what produced the action of the board, and would not be shown by the record of the proceedings of such board. There being no right to a trial *de novo,* under the holding in the *Selde* case, there was no appeal from the action of the board which would afford an adequate remedy."

It is apparent that, both in making the order establishing the district and in refusing to grant a rehearing thereafter, the county board exercised its discretion, that fraud or arbitrary action is not established by the record, and that the courts cannot interfere even though they may be convinced that the wrong result was reached.

This being the settled rule in this state, and it appearing that, on the face of the record, the proceedings leading up to and culminating in the order made by the county board for the establishment of drainage district No. 10 were in all things regular, and in compliance with the statute, except only the bond given on behalf of the petitioners for the establishment of the district, we will, though little reliance seems to be placed on that point, refer to it briefly. It appears that the petitioners presented with their petition a bond in the sum of $200, conditioned as provided by statute, and thereafter, on the advice of the county engineer, the board, of its own motion, ordered the petitioners to file an additional bond in the sum of $1,500, which order was never in any manner complied with. The general rule applicable is given in 19 C. J. 646, as follows:

"In some jurisdictions the petition must be accompanied by a bond to protect the county and other in-

terested persons against the expense of the preliminary proceedings in case the drainage district or ditch is not established. But failure to give bond does not affect the jurisdiction of the court or board, and defects therein will not invalidate the proceedings after the bond has been acted upon and the drain or district established."

This seems to be a reasonable and salutary rule, as well as the general one, and we are content to follow it.

The judgment of the trial court is affirmed.

PARKER, C. J., MITCHELL, and BRIDGES, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 16841. Department One. March 3, 1922.]

GEORGE SAYLES, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.[1]

APPEAL (102)—RIGHT TO APPEAL—CESSATION OF CONTROVERSY—LAPSE OF TIME. Where a business license expires pending appeal from a judgment determining the rights of the parties in an action to restrain the city from revoking the license, the question becomes a moot one which the supreme court will not decide nor entertain for the purpose of determining costs.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 22, 1921, in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

Walter F. Meier, Edwin C. Ewing, and *Charles T. Donworth,* for appellants.

Guie & Halverstadt and *Carroll B. Graves,* for respondent.

TOLMAN, J.—Respondent, as plaintiff, brought this action to enjoin the city of Seattle and its officers from

[1]Reported in 204 Pac. 778.

enforcing an ordinance (No. 41886) enacted by the city council on January 31, 1921, revoking a license theretofore issued to him to maintain and operate a billiard and pool parlor at a designated place within the city, and to enjoin any interference with his conduct of that business under such license. From a decree granting him the relief sought, this appeal is prosecuted.

It clearly appears from the record that the license herein referred to, by its terms, expired not later than January 5, 1922, and therefore, when this case was reached for hearing in this court, the license and all rights thereunder had wholly ceased to exist, and the question at issue had become a moot one only. This court has uniformly held that it will not consider or decide cases when no controversy longer exists, nor entertain jurisdiction for the purpose of determining the mere question of costs. *Holly-Mason Hardware Co. v. Schnatterly,* 111 Wash. 29, 189 Pac. 545; *Wilson v. Fraser,* 67 Wash. 347, 121 Pac. 829, and cases there cited.

For the reasons given, the judgment appealed from will stand affirmed, without costs to either party.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16921. Department Two. March 6, 1922.]

H. F. McCLUNG *et al.*, *Respondents*, v. KING COUNTY, *Appellant*.[1]

HIGHWAYS (61)—DEFECTS—DUTY OF MAINTENANCE—LIABILITY OF COUNTY—STATUTES. Under Laws 1917, ch. 118, p. 468, providing that each county should maintain a "permanent highway maintenance fund" for the upkeep of permanent highways established within its limits by the state, to which fund moneys theretofore held by the state to the credit of the county for maintenance should be turned over to the county, which money was to be expended by the county for maintenance and repair of primary, permanent or like highways within its limits, the duty of maintaining such highways is placed on the county in its corporate capacity, and not as a direct agent of the state; and extends to the curing of defects in the original construction by the state, in view of the established rule of the courts prior to the enactment that "maintenance" is to be construed as the keeping of highways in a reasonably safe condition for ordinary travel. [See Rem. Comp. Stat., §§ 6821-6824.]

SAME (64) — DEFECTS — NOTICE TO COUNTY — EVIDENCE — SUFFICIENCY. Notice to county commissioners that a highway was dangerous by reason of inherent defects is amply supported by evidence that its condition had been reported to them by the county engineer every year during a period of four years, with plans to obviate the defects.

DAMAGES (80)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $10,000 for personal injuries is not to be deemed excessive, where, although not necessarily permanent, there was testimony that it might take years for recovery, and it appeared that some ten months after the accident the injured party was required to undergo an operation for the purpose of stopping hemorrhages and there was uncertainty as to the results of the operation at the time of trial.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered June 23, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective highway. Affirmed.

[1]Reported in 204 Pac. 1064

Malcolm Douglas, Howard A. Hanson, and *Wm. Parmerlee,* for appellant.

Thos. D. Long, for respondents.

TOLMAN, J.—This is an action to recover damages for personal injuries alleged to have been sustained by the respondent Myrtle P. McClung while traveling upon a public highway in King county. The plaintiffs were awarded a verdict of $10,000, and from a judgment thereon, the county appeals.

The facts admitted and which the jury may have found from conflicting evidence, are substantially as follows:

A highway, now known as permanent highway No. 14, has existed many years, extending some miles in a southerly direction from the city of Seattle to the town of Des Moines. Some years prior to the time in question, under the permanent highway act, Rem. Code, § 5879-1[1] *et seq.* (P. C. § 6157), this highway was paved with brick, laid on a cement foundation, without expansion joints, except one section, a mile in length, which was laid with expansion joints. On June 21, 1920, respondents were driving over this road in a truck, the husband operating the truck, and the wife with their two children on the seat beside him. The truck was not loaded. They were traveling at a speed of some thirteen miles per hour. To all appearances the road was in excellent condition, free from obstructions, and apparently safe for travel. Suddenly, and without any warning sound or indication, the pavement underneath the truck exploded with great force, tearing up about 200 square feet of the surface, hurling brick and debris into the air fifteen to twenty feet, and throwing large pieces of the paving material two feet or more in diameter clear of the roadway. The

[1]Note: See Rem. Comp Stat., § 6821 *et seq.*

force of the explosion stopped the truck instantly, and Mrs. McClung was thrown therefrom to the pavement, sustaining the injuries complained of. Other evidence in the case will be mentioned in the proper connection as we proceed.

The complaint charges negligence in three respects: (1) that the county adopted a plan for the improvement of the highway which was defective, specifying the alleged defects; (2) that the county was negligent in adopting such plan, and in constructing the road according to its specifications, in that it could, by the exercise of reasonable care and diligence, have ascertained that such defects existed in the plan in advance of the construction; (3) that the county failed and neglected to keep and maintain the road in a reasonably safe condition for ordinary travel after it had been constructed.

Upon the objection of the county, the trial court ruled out the evidence offered by respondent tending to prove the two first mentioned allegations of negligence, upon the theory that the county was acting as the direct agent and under the direction and control of the state in the adoption of plans and carrying out the construction work thereunder. The county, of course, does not complain of this ruling, so far as it goes, and, in the absence of a cross-appeal, its correctness is not now before us for review, and we must assume for present purposes that it was a proper holding. The county does, however, complain because the ruling was not extended so as to cover also the third charge of negligence as to upkeep and maintenance, contending that in these matters it acted as the direct agent of the state, using funds raised by state tax levies, and even if not, there would be no liability upon the county if it maintained the highway in the same or as good condition as it received it.

The act under which this improvement was constructed provides for maintenance after construction, as follows:

"Whenever the improvement of any permanent highway shall have been completed and accepted under the provisions of this act, the same shall be maintained in the same manner as is provided by law for the maintenance of other public highways and roads." Rem. Code, § 5879-12 (P. C. § 6169). [Rem. Comp. Stat., § 6784.]

If this means in the manner provided by law at the time of the enactment of that particular statute, then it places the duty to maintain upon the county, for, going back as far as 1903, by statute, the duty of maintenance of all roads was placed upon the county, with the single exception of state roads as defined by Rem. Code, § 5897 (P. C. § 6835) built entirely with state money, as provided by ch. 186, Laws of 1909, p. 649. Respondents contend that this act has been repealed, but whether so or not, it clearly does not apply to the highway now under consideration, which was built with money raised by assessment against the property benefited, and by a tax on the property of King county, levied by the state, it is true, carried into the permanent highway fund, but there held by the state to the credit of King county, and to be expended only in King county. But in any event, the act of 1911, from which we have quoted above, was amended in 1913 by ch. 154, Laws of 1913, p. 491, § 5, so as to provide:

"Five per cent of all moneys credited to each county under this act and which shall be derived from taxes levied for the year 1912 and subsequent years shall be set aside and expended by the board of county commissioners, upon vouchers approved by such board, for maintaining and repairing roads constructed under the provisions of this act and other roads of like character, and no part of such five per cent shall be

expended for any other purpose." (Rem. Code, § 5879-14).

And in 1917, the legislature, by ch. 118, p. 468 of the laws of that year, in providing for the maintenance of permanent highways, created in each county of the state "a county fund to be known as the 'Permanent Highway Maintenance Fund'"; directed that the moneys theretofore held by the state to the credit of the county for maintenance purposes, and other moneys as therein provided, should go into that fund, and in § 4, p. 469, of the act, provided:

"The county auditor shall issue warrants for the expenditures from said fund on vouchers approved by the engineer in charge and allowed by the board of county commissioners, which expenditures shall be for the sole purpose of maintaining and repairing primary and permanent highways or highways of like character and for equipment for the maintenance thereof within the respective counties, and the same shall not be expended for any other purpose except as hereinafter provided." [Rem. Comp. Stat., § 6824.]

So that, at and before the time of this accident, King county had possession and control of funds designated by law to be used for the purpose of maintaining this and other highways, both permanent and primary, and we see no escape from the conclusion that from the time the 1917 act took effect, at least, the whole duty of maintaining this highway was upon the county, not as a direct agent of the state, but in its corporate capacity.

But it is contended, even so, that the duty to maintain did not cast upon the county the burden of curing defects in the original construction, and that its obligations were fully performed when it repaired the ravages of time and use and kept the road in the condition in which it was left when the improvement was completed. If the word "maintain" were used in a strict, limited sense, and its dictionary meaning only

is to be applied, then there is force in this position, but to so construe it would be highly technical. As early as 1895, in the case of *Sutton v. Snohomish,* 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, this court said:

"We think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty."

In *Dignan v. Spokane County,* 43 Wash. 419, 86 Pac. 649, it was said:

"The county is obligated to keep its highways in a reasonably safe condition for ordinary travel only, . . ."

These and many other cases from this court and from other courts are reviewed and approved in *Swain v. Spokane,* 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D 754, and in the light of these decisions which established the rule long before the enactment of the statutes referred to, we are of the opinion that the legislature used the verb "maintain," in its various forms, in the sense required by the law thus laid down, that is, to maintain in a reasonably safe condition for ordinary travel. In any event, we held in *Stone v. Seattle,* 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253, that a municipality could not relieve itself from liability for defective streets because the defect was in the original plan.

It may be that in a case such as this, where there was an inherent defect, the evidence of notice should be convincing, but in this case it is clearly so. The county engineer and his assistant testified to some

twenty-three cases of bulges, breaks, and blowouts, substantially one-half of which were termed explosions, all occurring on this highway prior to this occasion, at points other than the one mile laid with expansion joints, and that the highway was reported to the county commissioners as dangerous by the county engineer in the years 1917, 1918, 1919 and 1920, and plans were presented to the commissioners to obviate the cause of these disturbances, orally in 1917, 1918 and 1919, and by written report in 1920, but no action was ever taken thereon, and nothing whatever was done to remove the cause, or at all, except, after a disturbance had occurred, to repair the damage caused thereby. We conclude that there was ample evidence to carry the case to the jury upon the only ground of negligence submitted by the trial court.

What has so far been said disposes of all the appellant's assignments of error except those relating to the amount of the verdict. It is strenuously contended that the verdict is so excessive as to indicate passion and prejudice on the part of the jury, and, in the light of the cold record, it does seem large. No one testified that the injuries were necessarily permanent, but at the time of the trial, some ten months after the accident, there was shown to be some improvement, though the extent and permanency thereof was left in doubt, and medical experts testified that while ultimate recovery was to be expected, and usually in such cases could be looked for in a few months, still individual cases differed, and it might take years. Considering the time which had intervened before the trial, the then recent operation for the purpose of stopping hemorrhages, the uncertainty of the results of that operation, and the indefinite character of the testimony as to final recovery, we are inclined to agree with the conclusion

of the trial court, who saw and heard the witnesses, that the amount of the verdict was not against the weight of the evidence, and could not be said to be the result of passion and prejudice.

The judgment appealed from is affirmed.

PARKER, C. J., FULLERTON, and MITCHELL, JJ., concur.

[No. 16915. Department One. March 6, 1922.]

JOHN F. MADDOX, *Appellant*, v. INDUSTRIAL INSURANCE COMMISSION, *Respondent*.[1]

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION—CLASSIFICATION OF INJURIES — AWARD — JURISDICTION — REVIEW — STATUTES. The superior court has no original jurisdiction to determine the classification of injuries received by one who is entitled to compensation under the workmen's compensation act, its province in such matters being to pass upon appeals from final decisions of the commission.

SAME (121-2)—DECISION OF DEPARTMENT—APPEAL—EFFECT OF DISMISSAL WITH PREJUDICE. A judgment dismissing an action "with prejudice" wherein the original jurisdiction of the superior court had been improperly invoked in a case under the workmen's compensation act, when the question was properly one in the first instance for the industrial insurance commission, was not erroneous, since it did not foreclose a hearing before the commission nor preclude a rehearing before the court on appeal from the commission's decision.

JUDGMENT (182, 213-1) — CONCLUSIVENESS — BAR — DISMISSAL FOR WANT OF JURISDICTION. The dismissal of an action "with prejudice" by a court not having jurisdiction does not operate against a full and fair hearing subsequently before a tribunal properly invested with jurisdiction to hear the controversy.

Appeal from the judgment of the superior court for Pierce county, Clifford, J., entered August 2, 1921, upon sustaining a demurrer to the complaint, dismiss-

[1]Reported in 204 Pac. 1057.

ing an action to obtain a reclassification of injuries under the workmen's compensation act, and for an award of compensation. Affirmed.

P. L. Pendleton, for appellant.

The Attorney General and *John H. Dunbar, Assistant,* for respondent.

PARKER, C. J.—The plaintiff, Maddox, commenced this action in the superior court for Pierce county by summons and complaint as an ordinary action, seeking a judgment directing the industrial insurance commission to reclassify his injury, received in an extra-hazardous occupation, as one of total disability, and to make him an award accordingly; his injury having theretofore been classified by the commission as one of lesser degree and he having been awarded compensation accordingly. The commission demurred to plaintiff's complaint upon the ground, among others, of want of jurisdiction in the superior court; which demurrer was by the superior court sustained. The plaintiff having elected to stand upon his complaint and not plead further, judgment of dismissal was accordingly rendered against him with prejudice.

The facts determinative of appellant's claimed rights in this action, as disclosed by his complaint, in so far as we need here notice them, are as follows: In January, 1918, appellant was injured while employed in an extra-hazardous occupation, and his injury was thereafter classified by the industrial insurance commission as one of lesser degree than total disability, upon which classification he was awarded compensation. On May 5, 1921, appellant, conceiving that the results of his injury had become so aggravated, since the original award made to him, as to entitle him to a reclassification as one totally disabled, filed with the

industrial insurance commission his claim asking an additional award accordingly. He concluded his claim with a request that the commission make its decision in his favor thereon within fifteen days. The commission not having rendered a decision upon his claim within the fifteen days, he immediately thereafter commenced this action. His alleged reason for not waiting for a formal final decision by the commission and appealing therefrom to the superior court, as provided by the workmen's compensation act, is, in substance, that the failure of the commission to render its formal decision upon his claim within the fifteen days, as requested, was, in legal effect, a final decision denying his claim.

We think it is plainly apparent that this is nothing but an effort on the part of appellant to bring into the original jurisdiction of the superior court a controversy over which that court does not have any original jurisdiction. It is plain from the provisions of our workmen's compensation act that the original jurisdiction to determine the classification of injuries received by workmen in extra-hazardous occupations and the amount of awards to be made such injured workmen rests exclusively in the commission, and that such questions must first be decided by the commission before the courts can be resorted to looking to the further consideration of the merits of such controversies. The manner of bringing such controversies into the superior court is by review in the nature of an appeal from the final decision of the commission, the procedure for which is very simple and clearly pointed out in § 6604-20,[1] Rem. Code (P. C. § 3488). [workmen's compensation act.] The jurisdiction of the superior court over such controversies is appellate only, and not

[1]Note: See Rem. Comp Stat., § 7697.

original. This is true though some of the questions arising in such controversies brought into the superior court for review are triable *de novo;* but that does not mean that even as to such questions they may in the first instance be tried in the superior court. Plainly, we think the superior court has no jurisdiction in this action over the controversy which appellant seeks to have tried therein.

Counsel for appellant complains particularly of that part of the superior court's judgment of dismissal reciting that such dismissal is "with prejudice." Counsel seems to fear that this will prevent further prosecution of appellant's claim for reclassification before the commission and before the superior court upon appeal from a decision of the commission. We think such is not the result. The judgment is final and with prejudice only in the sense that appellant cannot maintain any action invoking the superior court's original jurisdiction looking to the adjudication of his claim therein.

The judgment is affirmed.

BRIDGES, FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16837. Department Two. March 6, 1922.]

JOHN MOILANEN, *Respondent*, v. BLAKE FURNITURE COMPANY, *Appellant*.[1]

APPEAL (406)—REVIEW—DISCRETION—GRANTING NEW TRIAL. The granting of a new trial where the court had already granted two new trials against the defendant is not of itself sufficient to uphold a charge of abuse of discretion on the part of the trial court.

NEW TRIAL (56-1)—PROCEEDINGS—ORDER GRANTING NEW TRIAL. An order granting a new trial "for errors occurring in the trial of said cause," is not to be limited merely to that provision of Rem. Code, § 399, authorizing a new trial for "error in law occurring at the trial," where other grounds were assigned under other subdivisions of that section of the code.

Appeal from an order of the superior court for King county, Smith, J., entered October 2, 1920, granting a new trial. Affirmed.

John F. Dore, for appellant.

James B. Murphy and *Arthur H. Hutchinson*, for respondent.

HOVEY, J.—This is an appeal from an order granting a new trial in a case where the respondent was plaintiff and the appellant was defendant. Upon a former trial of the same case, a verdict was also given in favor of the appellant and a new trial was thereupon granted.

It is contended by the appellant that the lower court abused its discretion in granting the new trial where there had already been two trials. We do not think that this can be said to be such an abuse of discretion as would justify the interference of this court.

It is next contended that, inasmuch as the order granting a new trial recited that the court "being of the opinion that a new trial should be granted for

[1]Reported in 204 Pac. 794.

errors occurring in the trial of said cause," it must be assumed that the only ground sustained by the trial court was the sixth subdivision of the motion for a new trial, being "error in law occurring at the trial excepted to at the time by the plaintiff," and that no error in law was claimed by respondent upon the trial. The motion for a new trial included assignments under subdivisions (1), (2), (3), (4), (7) and (8) of § 399, Rem. Code (P. C. § 8225). In our opinion, the word "errors" as used by the court was not intended to be so limited, but could be held to apply to many of the other grounds alleged in the motion.

The judgment is affirmed.

PARKER, C. J., MAIN, and MACKINTOSH, JJ., concur.

[No. 16992. Department Two. March 7, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Nelson Abbott et al., Plaintiff*, v. THE SUPERIOR COURT FOR SKAGIT COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN (158)—PROCEEDINGS—REVIEW ON CERTIORARI—STATEMENT OF GROUNDS—SUFFICIENCY. Under Rem. Code, § 1002, providing that the writ of certiorari shall be granted to correct an erroneous proceeding, or proceeding not according to the course of the common law, when there is no appeal, an adjudication of use and necessity in a condemnation proceeding is reviewable under such a writ where the petition therefor alleges that it is contrary to the evidence and the law, that the property sought to be appropriated is not properly described in the petition for condemnation and is not necessary for the improvement, that the finding that the improvement would provide a good and sufficient outlet is contrary to the evidence, and that the orders overruling the motion to strike and make more definite and overruling a demurrer are contrary to law.

Application filed in the supreme court December 21, 1921, for a writ of certiorari to review an order of pub-

[1]Reported in 204 Pac. 815.

lic use and necessity in condemnation proceedings. Granted.

Byers & Byers and *H. A. McLean,* for relator.

Wright, Kelleher, Allen & Hilen and *Thos. Smith,* for respondents.

MAIN, J.—This is an application for a writ of certiorari, or as it is called by the statute, a writ of review. The respondents are the drainage commissioners of drainage district No. 19 in Skagit county, and brought an action in condemnation to acquire the lands necessary for a system of drainage which they claimed would be benefited by the improvement. The relators are the owners of land which would be affected by the condemnation. After a hearing, the trial court entered an order of public use and necessity. It is this judgment which is here sought to be reviewed.

The respondents resist the issuance of the writ, claiming that the showing is not sufficient. The petition for the writ is supported by an affidavit.

The sole question is whether the relators have made a sufficient showing to justify the issuance of the writ of review. The adjudication of an order of use and necessity in a condemnation proceeding cannot be reviewed by appeal, but only in a proceeding like this. *Calispel Diking Dist. No. 1 v. McLeish,* 63 Wash. 331, 115 Pac. 508; *Chicago, Milwaukee & P. S. R. Co. v. Slosser,* 82 Wash. 467, 144 Pac. 706. The statute § 1002 of Remington's 1915 Code (P. C. § 7418), provides that a writ of review shall be granted to correct any erroneous or void proceeding, or proceeding not according to the course of the common law, and "there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." Section 1003 (P. C. § 7419) provides, among other things, that

the writ may be granted without notice. It will be observed that § 1002 would seem to require the writ to be issued where there is no appeal, but that if the question were whether the appeal was an adequate remedy the court would be required to exercise discretion before the issuance of the writ. The statute says that the writ shall be granted to correct an erroneous proceeding, or proceeding not according to the course of the common law, when there is no appeal. In *State ex rel. McCormick v. Superior Court,* 43 Wash. 91, 86 Pac. 205, it was held that the application for the writ must disclose some apparent error before the writ will be issued. In that case the writ was denied, but the relator there did not allege any distinct ground or particular claim of error. The sections of the statute above mentioned were not referred to in the opinion.

It would seem that, under the positive language of the statute, the holding in that case should not be extended. The showing in the present case, however, brings it within the rule there announced. It is stated in the affidavit filed in support of the petition that the adjudication that the contemplated use for which the land was sought to be appropriated was a public use was contrary to the evidence and contrary to the law; that the property sought to be appropriated was not properly described in the petition for the condemnation and was not necessary for the establishment of the improvement; that the adjudication that the improvement would provide a good and sufficient outlet was contrary to the evidence; that the orders overruling the motion to strike and make more definite and overruling a demurrer were contrary to law. If the things alleged in the affidavit are true, the order of public use and necessity was not entered according to the course of the common law. *State ex rel. Matson v. Superior Court,* 42 Wash. 491, 85 Pac. 264.

The showing made brings the case within the holding in *State ex rel. McCormick v. Superior Court, supra.* If the case were one where the question was whether there was an adequate remedy by appeal, a different question would be presented. Authorities from other jurisdictions are of little aid in determining the question here presented because of different statutory provisions.

The writ will issue.

PARKER, C. J., HOLCOMB, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16759. Department One. March 8, 1922.]

MARK E. COLE *et al.*, *Appellants*, v. WASHINGTON WATER POWER COMPANY, *Respondent*.[1]

STREET RAILROADS (22)—COLLISION AT CROSSING—PROXIMATE CAUSE. The failure to sound a street car signal on approaching a street crossing cannot be ascribed as the proximate cause of collision between the car and an automobile, where both the driver and an occupant of the automobile were aware of the approach of the car in sufficient time to have avoided the collision.

SAME (20)—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE. One driving an automobile toward a street car line, at a rate of speed slow enough to permit of his stopping the automobile after seeing a street car approaching the crossing, is guilty of contributory negligence in a collision resulting from his driving upon the track, irrespective of whether the street car may have been exceeding the speed limit, and his negligence is imputable to his employers who were occupants of the automobile.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered March 23, 1921, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained through a collision between plaintiff's automobile and a street car. Affirmed.

[1]Reported in 204 Pac. 1060.

E. B. Quackenbush and *S. R. Green,* for appellants.
Post, Russell & Higgins, for respondent.

PARKER, C. J.—The plaintiffs, Cole and wife, seek recovery for personal injuries suffered by both of them while riding in their automobile, at the intersection of Scott street and Fifth avenue, in the city of Spokane, claimed by them to be the result of the negligent operation of one of the street cars of the defendant company. The cause proceeded to trial in the superior court for Spokane county, sitting with a jury, upon the issues of the negligence of the servant of the defendant in the operation of its street car, and the contributory negligence of the servant of the plaintiffs in the operation of their automobile. At the conclusion of the evidence introduced in behalf of the plaintiffs, counsel for the defendant, by appropriate motion, challenged the sufficiency of the evidence to support any recovery by the plaintiffs; the motion being rested upon the ground of want of proof of negligence on the part of its servant in the operation of the street car, and upon the ground of conclusive proof of contributory negligence on the part of the plaintiffs' servant operating their automobile. The trial court granted the motion and directed the jury to return a verdict in favor of the defendant, which was done. A judgment was rendered accordingly, from which the plaintiffs have appealed to this court.

Observations made by the trial judge sustaining the challenge to the evidence indicate that he rested his decision upon the theory of contributory negligence on the part of the servant of appellants in the operation of their automobile. Fifth avenue runs east and west and has upon its surface two street car tracks. East-bound cars run upon the south track, while west-bound cars run upon the north track. The south rail

of the south track is twenty-four feet from the south boundary line of Fifth avenue. Scott street runs north and south, terminating at its north end in, and at right angles to, Fifth avenue. Scott street descends to Fifth avenue for a distance of some three hundred feet from the south, on a grade of five per cent. Fifth avenue descends to Scott street for a distance of one hundred feet or more from the west, on a grade of one and four tenths per cent. At the southwest corner of Fifth avenue and Scott street there is a store building, the north wall of which fronts approximately twenty-five feet along the south boundary line of Fifth avenue, and the east wall of which fronts approximately forty-five feet along the west boundary line of Scott street. There are other buildings and obstructions south of this store building along the west side of Scott street for a considerable distance—probably two hundred feet or more —preventing persons, while approaching Fifth avenue from the south along Scott street, from seeing to the west along Fifth avenue, until they come near to the south boundary of Fifth avenue, where they can see west past the corner of the store building, which corner of the store building, as already noticed, is twenty-four feet from the south rail of the south street car track.

Early in the evening of August 21, 1920, appellants, Mr. and Mrs. Cole, were visiting at the home of a Mrs. McLaughlin, situated on the west side of Scott street, at an agreed distance of three hundred fifty feet south of Fifth avenue; their automobile being parked in front of Mrs. McLaughlin's home. At about half past eight o'clock, they started to go to their home in their automobile, both sitting in the rear seat, their driver sitting in the front seat and driving the automobile for them. They proceeded north on Scott street, intending to turn west on Fifth avenue. Their driver drove the automobile along the easterly side of the

roadway of Scott street, keeping near the east curb, and, while they were crossing the south street car track on Fifth avenue, well south of the center line of Scott street, an east-bound street car, belonging to respondent, collided with appellants' automobile, striking it broadside, at the instant its front wheels were to the north and its rear wheels to the south of the south track. The automobile was pushed or carried sideways to the east by the street car a distance of about forty-five or fifty feet, when the car came to a stop with the automobile still across the front of the car, the fender of the car having passed under the automobile. Appellants were both seriously injured by the collision. Appellants' driver testified as to what he saw and did, immediately preceding the accident, in part as follows:

"I was driving the Ford automobile at the time of the accident complained of. . . . We had been at Mrs. McLaughlin's and the car was parked in front of her house on the west side of the street. . . . we proceeded north on Scott street and when the front wheels just crossed the sidewalk across Scott street, I first saw the car something like half way, or maybe more, up the street and when I was on the crossing, right on the first track, the street car was right on to me before I knew it. I was something like twenty-four feet south of the first rail when I first saw the street car. The front wheels of the auto were just over the sidewalk crossing. I was near the right-hand curb of Scott street and going north. I had been looking out for a street car as I approached the crossing. There is a story and a half building and several other houses on the west side of Scott street and three or four houses and several trees and telephone posts on the south side of Fifth avenue west of the brick building. . . . The street car did not sound any bell, whistle or other signal of its approach. When the auto was struck it was setting as square across the track as I could tell at the time. The front wheels were about a foot over the north rail of the south track and the

hind wheels about a foot south of the south rail. The street car struck the auto broadside. I was knocked unconscious by the collision and knew nothing after that. I was sitting on the left-hand side of the auto next the street car, driving; . . . On the auto there were two headlights and a rear light in perfect condition. Q. Now in your best judgment, how fast were you driving the automobile just before the accident? A. Between five and ten miles an hour. Q. Now, you saw this car when it was over half a block away from you? A. Yes, sir. Q. And it struck your car after you had driven twenty-two or twenty-four feet, did it not? A. Yes, sir. I subsequently measured the distance from the place where the street car seemed to me to be at the time when I first saw it and the place where it was when it struck the auto and found it to be about one hundred ninety-eight feet. . . . I had my power on up to the time I approached Fifth avenue and threw it off before I got there. I threw it off about fifty feet south of the south crosswalk; by crosswalk I mean sidewalk crossing. I let it coast from there and did not throw it back in. I had my brakes on going down the hill but did not have them on when I approached the crossing, nor at all afterwards until I was struck by the street car. I just let it drift at five to ten miles an hour without power. Oh, about seven; six or seven; I couldn't say for sure. . . . [It is apparent that the driver meant, by his reference to having the power on, and throwing it off as he approached Fifth avenue, that he merely threw out his clutch and did not stop the running of his engine.] When I first saw the street car I was sitting just back of the south line of the south crosswalk. . . . Q. When you saw that street car back there more than half a block away,—did you, what did you do? A. I put my attention to crossing. Q. And did you look at the street car again? A. Not until it was right on me. Q. And how far was it then? A. It would be about ten feet. Q. And all this time you didn't put on your power? A. No, sir. Q. Just drifting on across there? A. Yes, sir. . . . Q. When you saw that street car, . . . one hun-

dred ninety-eight feet up the street there, the street car was moving at that time? A. I suppose it was. Q. Well, you just took a glance at it, did you? A. Yes, sir. Q. And then you looked down and attended to running your car? A. Yes, sir. Q. You didn't try to hurry up or anything of that kind? A. I just glanced—I just went on as if I didn't know there was going to be an accident. I just went on. Q. You didn't pay any more attention to the street car, is that right? A. Until it was right on to me. Q. About ten feet away from you? A. Yes, sir. . . . The night was rather dark; it was not stormy or cold; a pleasant August evening. . . . Q. Now you stated that you didn't turn on your power, after you had a glimpse of the street car, why was that? A. In turning the corner I couldn't use my power; it was a rough corner. Q. You say that is a rough corner? A. The rails are above the ground in some places and there is chuck holes. . . . Q. Well, now you had your headlights on, didn't you? A. Yes, sir. They would shine one hundred feet. That would show us whether the street was rough or smooth. I was looking ahead and saw the street. . . ."

Mrs. Cole testified as to what she saw, immediately preceding the accident, in part as follows:

"We must have been going between five and ten miles an hour. I couldn't say just what, I am not used to driving an automobile. I was riding in the rear seat in the middle, my little girl to my left and husband at my right. Q. As you came near the intersection of Scott and Fifth avenue, did you look for vehicles or cars on Fifth avenue? A. Yes, sir. I always keep a watch. . . There was no car in sight until we were on the crosswalk on the south side of Fifth avenue. . . The front of the auto was over the crossing. When I first saw the street car it was half way up the block west on Fifth avenue. Q. Did you say anything to the driver about the car then? A. I didn't say anything to the driver then because I didn't think there was any danger in it that far off. I thought we had time to get across safely. I never heard the street car whistle,

sound a bell or give any alarm at any time. Q. When did you next notice the street car after that? A. Just as we started across the track; the fore part of our car was across the track. Q. Well, then where was it? A. Well, I couldn't tell; it was just a flash and I never saw or heard anything more. . . . Q. Did you notice whether it was going fast or slow? A. I just got a glimpse of it at first so I couldn't tell you. . ."

Mr. Cole, referring to what occurred immediately preceding the accident and as to what he saw and heard, or, rather, as to what he did not see and hear, testified in part as follows:

"We wasn't going over seven or eight miles an hour . . I could tell just about what speed we was going. I didn't see or hear the street car at all that evening. . . I was sitting on the back seat on the right-hand side . . . I didn't look for any vehicles; . ."

A Mrs. Tottenhouse testified as to her observations of the street car and automobile immediately preceding the accident, in part as follows:

"On the evening of the accident I was coming east on Fifth avenue about eight thirty in the evening . . . I noticed there was a street car coming, that seemed to be coming fast, and I got the impression it was coming fast from the sound, . . and then all at once there was a sharp blast of the whistle and I glanced around and the automobile was just across the track and the street car was almost on it, and then almost instantly the crash came. . . When I first heard the whistle and the crash, I wasn't very far east of Scott street, . ."

Mrs. McLaughlin testified as to what she saw while standing in front of her home on Scott street, which, as already noticed, is three hundred fifty feet south of Fifth avenue, in part as follows:

"I was standing in front of my home about a block away. The Coles had been calling at my home and left

just before the accident. They started and were going about ten or twelve miles an hour, I should judge, and when they got to the corner I saw the street car emerge from the corner of the building going about twenty-five miles an hour and the whistle and the accident all happened at once, . . . I saw the street car for about forty-five feet, I think, before it struck the auto. I didn't measure the distance. . . When I first saw the street car come out from behind the building, the auto was over to the right of the road. The street car was going east and when it came out from behind the building the hind wheels of the auto were just passing over the south crosswalk. . . I went down to the scene of the accident. The front of the street car was past the crossing on the east side of the street. I don't know the length of a street car. The back part had not reached the east crosswalk. . ."

This is the substance of all the evidence, telling us of the speed of the street car, the sounding of any signal by the motorman, the looking by those in the automobile for the approach of a street car from the west, the speed of the automobile, and the control of the automobile by appellants' driver.

At the time of this accident, there was in force an ordinance of the city of Spokane (No. C2403, § 3), reading in part as follows:

"That at street intersections street cars shall have the right of way over other vehicles. . ."

Noticing first respondent's negligence, claimed by appellants to be the proximate cause of their injury, it seems to us very difficult to arrive at the conclusion that reasonable minds could decide other than that this evidence fails to affirmatively show that the street car approached or entered the street intersection at an excessive or unlawful rate of speed. It is true that appellants' driver places the street car, when he first saw it, at such a distance west of the intersection that

it would have to travel at an excessive rate of speed in order to arrive at the place of the collision at the same time the automobile did; but it is to be remembered that appellants' driver's estimate of the distance the street car was away when he first saw it was, of necessity, not an exact estimate and was based upon little else than a mere glance by him in that direction; and it is also to be remembered that the car ran only forty-five or fifty feet at most past the point of collision before it came to a stop. We pass, however, the question of respondent's negligence in running the street car at an excessive rate of speed, and assume, for argument's sake, that the jury might be warranted in finding respondent negligent in that particular. As to the alleged negligence of respondent's motorman in failing to sound a signal upon approaching the street intersection, it is manifest from the testimony of both Mrs. Cole and the driver of the automobile that such failure to sound a signal could in no event have been the proximate cause of the accident, since it is manifest that both Mrs. Cole and the driver of the automobile saw the street car and were as well advised of its approach as if the signal had been sounded, as required by the ordinance. *Blanchard v. Puget Sound T., L. & P. Co.*, 105 Wash. 226, 177 Pac. 822. It is apparent then that the only negligence respondent was guilty of, with which we are here concerned, is the alleged excessive speed of the street car, which manifestly was slight in character, though, for present purposes, we shall assume it would have been sufficient to carry the case to the jury, apart from the contributory negligence of the driver of the automobile. We notice this manifest slight degree of negligence on the part of respondent, to the end that we have a better view of the position of the driver of the automobile with reference to the

approach of the street car, and of his opportunity to have avoided the accident.

Whatever may be said as to respondent's negligence becoming a question for the jury to decide, we think, in any event, it is apparent that appellants' driver was, as a matter of law, guilty of contributory negligence such as to preclude recovery by appellants in this case, as held by the trial court. In view of appellants' driver's knowledge of the approach of the street car, or, rather, the knowledge which he, as a reasonably prudent person, ought to have possessed of its approach; the manifest comparatively slow speed of the street car—though possibly exceeding the lawful speed at that place—evidenced by the short distance it ran, following the collision, before stopping; the right of way of the street car over that of the automobile; and the manifest ease with which appellants' driver could have stopped the automobile within the twenty-four feet or more it traveled while he had a plain, unobstructed view of the street car before reaching the south street car track; we are of the opinion that this case must be decided, as a matter of law, in favor of respondent, because of the contributory negligence of the driver of the automobile, who, for the purpose of this case, was appellants' servant, rendering his contributory negligence imputable to appellants themselves. *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549; *McEvilla v. Puget Sound Tr., L. & P. Co.*, 95 Wash. 657, 164 Pac. 193; *Herrett v. Puget Sound T., L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024; *Blanchard v. Puget Sound T., L. & P. Co.*, 105 Wash. 226, 177 Pac. 822; *Devitt v. Puget Sound T., L. & P. Co.*, 106 Wash. 449, 180 Pac. 483; *Heath v. Wylie*, 109 Wash. 86, 186 Pac. 313; *Harris v. Seattle*, 118 Wash. 327, 203 Pac. 943.

One or two other contentions are made in appellants' behalf, but we find it unnecessary to notice them here, since, however we might view them, what we have already said would become decisive of the case.

The judgment is affirmed.

BRIDGES, FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16362. Department One. March 8, 1922.]

LEAVENWORTH STATE BANK, *Respondent*, v. WENATCHEE NORTHERN WAREHOUSE & MARKETING COMPANY, *Appellant*.[1]

PRINCIPAL AND AGENT (9)—EVIDENCE OF AGENCY—SUFFICIENCY. An agreement of a box company to furnish a marketing company with a quantity of fruit boxes, over and above the written contract between them for boxes, constitutes a contract of sale and not one of agency.

FRAUDS, STATUTE OF (22)—SALE OF GOODS—CONTRACT—VALIDITY. An oral agreement for the sale of fruit boxes of a value amounting to thousands of dollars is void under Rem. Code, § 5290, requiring contracts for the sale of merchandise the value of fifty dollars or more to be in writing.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered September 30, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Sumner & Lebeck, for appellant.

Herman Howe and *W. O. Parr*, for respondent.

FULLERTON, J.—On March 7, 1919, the Leavenworth Box Company, a corporation, entered into a contract with the appellant, Wenatchee Northern Warehouse & Marketing Company by the terms of which the box

[1]Reported in 204 Pac. 1051.

company agreed to sell to the marketing company two hundred thousand fruit boxes of defined specifications, at a price of fourteen cents per box, delivered free on board cars at Wenatchee, Washington. Later on, a written modification of the contract was entered into by which the specifications for one hundred thousand of the boxes were changed, the box company agreeing to deliver in lieu thereof one hundred thousand apple boxes of other specifications, the price and place of delivery to remain the same. This contract was substantially performed by the seller, all of the boxes delivered thereunder being billed to the purchaser at the contract price. The purchaser also bought of the seller some thirty-two thousand boxes, which the box company billed to it at a price of twenty-two cents per box.

The boxes were shipped to the purchaser in carload lots. At the time of the shipments of the separate carload lots, they were invoiced to the purchaser, showing the quantity and kind shipped, the price per hundred, and the total price, with a statement that the account therefor had been assigned to the respondent, Leavenworth State Bank. The statement also directed the purchaser to remit for the amount of the shipment to the bank.

The present action was brought by the Leavenworth State Bank upon thirteen of these assigned accounts, approximating fifteen thousand dollars; the bank admitting in its complaint that the defendant was entitled to certain offsets for freight paid, the precise amount of which it was unable to state.

The defendant answered, admitting the receipt of the boxes, except as to an inconsiderable number, but disputed the price to be paid for the boxes delivered in excess of the number delivered under the written contract. It counterclaimed for the shortage and for the freight paid, and these were admitted to be proper de-

ductions by the plaintiff and there is no controversy here concerning them. It further counterclaimed, alleging that, subsequent to entering into the original written contract, the same parties orally agreed that if the defendant "would secure orders for boxes, for 1919 season, that the [box company] would fill the same at the price of $.15½ f.o.b. Wenatchee;" that the defendant did procure orders for boxes to the number of ninety-seven thousand four hundred; that the box company repudiated the contract and that the defendant was compelled to purchase the same in the open market at an advanced price, and at a loss to itself in the sum of $3,991.75. The allegations concerning this counterclaim were put in issue by a denial.

On the trial of the cause, which was had before the court sitting with a jury, the court, after hearing the evidence concerning the last mentioned counterclaim, withdrew its consideration from the jury; directing them to find only on the issues made by the complaint and the denials thereto; also directing them to allow to the respondent the counterclaims which the plaintiff conceded to be just. The jury returned a verdict in favor of the plaintiff for approximately fourteen thousand dollars, and for the amount returned, judgment was entered. The defendant appeals, assigning error on the ruling of the court withdrawing the disputed counterclaim from the consideration of the jury.

The trial court admitted evidence on the disputed counterclaim evidently on the theory that the defendant's allegations with respect thereto could be construed as a contract of agency, withdrawing it when the proofs developed that it was not a contract of that sort. With these conclusions of the trial court we entirely agree. The most that the evidence tended to establish was that the representative of the box company orally promised that the box company would furnish

the defendants with such quantity of boxes, at the price named, over and above the number agreed in writing to be furnished, as their needs for the fruit season of 1919 might require; under no interpretation could it be construed as a contract of agency whereby the box company employed the defendant to procure orders on its behalf for fruit boxes. As an agreement for the sale of boxes, it is unenforcible under the statute (Rem. Code, § 5290; P. C. § 7746) [Rem. Comp. Stat., §5826] requiring contracts for the sale of goods, wares and merchandise of the value of fifty dollars or more to be in writing.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16553. Department One. March 8, 1922.]

STATE BANK OF GOLDENDALE, *Respondent*, v. JAKE N. BEEKS *et al.*, *Appellants*.[1]

APPEAL (272)—RECORD—AFFIDAVITS. Evidentiary affidavits used on a motion to discharge or sustain an attachment, to be available on appeal, must appear in the record by a statement of facts or a bill of exceptions.

ATTACHMENT (39-1) — DISSOLUTION — EFFECT OF AFFIDAVITS. Though the burden of sustaining the grounds of a controverted attachment are upon the party procuring it, an explanation by the defendant of the material allegations of the procuring affidavit for attachment is not sufficient to discharge the writ.

APPEAL (45)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS. An order refusing to strike interrogatories being interlocutory, no appeal lies therefrom in advance of appeal from the final judgment.

Appeal from orders of the superior court for Klickitat county, Kirby, J., entered January 27, 1921, denying motions to dissolve an attachment and to strike in-

[1]Reported in 204 Pac. 771.

terrogatories, after a hearing before the court. Affirmed.

Chas. F. Bolin and *Cull & Barnett,* for appellants.

John R. McEwen and *McMaster, Hall & Schaefer,* for respondent.

FULLERTON, J.—On July 16, 1920, the plaintiff, State Bank of Goldendale, began an action in the superior court of Klickitat county against the defendant Earl E. Redlinger, to recover the sum of $4,147.60, with interest. At the time of filing the complaint, it caused a writ of attachment to issue against the property of the defendant, alleging in its affidavit in support of the writ, (1) that the defendant is about to assign, secrete and dispose of his property with intent to delay and defraud his creditors; (2) that the defendant is about to convert a part of his property into money for the purpose of placing the same beyond the reach of his creditors; and (3) that the defendant has been guilty of fraud in incurring the obligation for which the action the defendant. Later, and after the defendant had apdefendant certain interrogatories to be answered by the defendant. Later, and after the defendant had appeared and demurred to the complaint, and had moved to strike the interrogatories, the plaintiff filed an amended complaint in which it made Jake N. Beeks a party to the action, and in which it stated its cause of action somewhat more fully and in detail than it stated it in its original complaint. In December following, the defendant Redlinger moved to dissolve the attachment, supporting its motion by his affidavit in which he controverted the allegations of fraud set forth in the plaintiff's affidavit. Later the plaintiff filed affidavits in opposition to the motion. The motion to dissolve the attachment and the motion to strike the inter-

rogatories came on to be heard before the trial court on January 20, 1921, at which time the court denied the motions. This appeal is from the orders entered to that effect.

With regard to the motion to dissolve the attachment, the appellant contends that the burden of supporting the grounds of the attachment rests upon the plaintiff and that he has not maintained the burden. It would possibly be a sufficient answer to the objection to say that the evidentiary affidavits are not before us. The statute does not make the evidentiary affidavits used on a motion to discharge or sustain an attachment a part of the record. These to be available in this court must be brought up as other facts, by a statement of facts or a bill of exceptions (*Windt v. Banniza,* 2 Wash. 147, 26 Pac. 189), and here they appear only in the transcript over the certificate of the clerk. But since the respondent has not made the objection, we have examined the affidavits certified and are convinced, as the trial judge was convinced, that they tend strongly to support the charge of fraud. The facts involve the merits of the action, and for that reason will not be detailed or further commented upon here. It is sufficient to say we see no reason for reversing the order for the reason urged.

The appellant seems to contend that it was only necessary to controvert and explain the material allegations of the procuring affidavit in order to be entitled to a discharge of the attachment. The cases of *Nettleton v. Howe,* 81 Wash. 32, 142 Pac. 450; *Fawkner, Currie & Co. v. Sanitary Fish Co.,* 105 Wash. 88, 177 Pac. 708; and *Bender v. Rinker,* 21 Wash. 633, 59 Pac. 503, are cited in support of the contention. But these cases, in so far as they are pertinent to the question, go no further than to hold that the burden of sustaining the

grounds of the attachment, when controverted, are upon the party procuring the attachment.

With regard to the appeal from the order refusing to strike the interrogatories, we agree with the respondent that such an order is interlocutory and not appealable in advance of an appeal from the final judgment in an action.

The orders appealed from will stand affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16636. Department Two. March 8, 1922.]

N. G. WHITE, *Respondent*, v. FRANK KLINE *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS (380, 384)—USE OF STREETS—ACCIDENT AT CROSSINGS—VIOLATION OF ORDINANCE—PROXIMATE CAUSE. Where the proximate cause of a collision between a taxicab and an auto truck was the negligence of the taxicab driver, the owner of the truck is entitled to recover for damages sustained, though the truck was driven by a son less than eighteen years of age for whom no permit had been obtained as required by city ordinance.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 24, 1920, upon findings in favor of the plaintiff, in an action for damages sustained in an automobile collision, tried to the court. Affirmed.

Morris B. Sachs, for appellants.

Shorett, McLaren & Shorett, for respondent.

MACKINTOSH, J.—This action for damages, arising out of an automobile collision, was tried to the court without a jury, and resulted in judgment in favor of the plaintiff.

[1]Reported in 204 Pac. 796.

The city ordinance of Seattle (No. 37,434, §§ 93, 167), where the collision occurred, makes it a misdemeanor for any person under the age of eighteen years to drive or operate a motor vehicle without first obtaining a permit. The collision in this case occurred between respondent's auto truck and appellants' taxicab. The respondent's son, who was less than eighteen years of age, was at the time driving the truck, without having obtained a permit. Frank Kline, one of the appellants, was the driver of the taxicab.

This appeal presents a question of fact and a question of law. It is the claim of appellants that, because the respondent, at the time of the accident, was operating his truck in violation of the ordinance, such negligence prevents his recovery. Of course, it is negligence *per se* to operate a vehicle without complying with the positive requirements of a statute or ordinance in regard to such operation, but that does not mean that the person guilty of negligence in that respect cannot recover against someone else whose negligence immediately occasioned the injury. Negligence arising from the violation of a statute has the same effect as any other negligence; if it is not the proximate cause of the injury it will avoid liability, the same as any other negligence. This court has sanctioned this rule heretofore in *Burlie v. Stephens,* 113 Wash. 182, 193 Pac. 684; *Koch v. Seattle,* 113 Wash. 583, 194 Pac. 572; and *Greater Motors Corp. v. Metropolitan Taxi Co.,* 15 Wash. 451, 197 Pac. 327.

The rule is generally recognized that the violation of the law must be the proximate cause of the injury suffered in order to bar the injured party's right of recovery. If there is no causal relation between the violation of the law and the happening of the accident, the right of recovery remains. *Lang v. New York Central*

R. Co., 255 U. S. 455; *Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150, 48 L. R. A. (N. S.) 675; *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 71; *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487, 52 L. R. A. (N. S.) 801; *Lockridge v. Minneapolis & St. L. R. Co.*, 161 Iowa 74, 140 N. W. 834, Ann. Cas. 1916A 158; *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542, L. R. A. 1915D 628; *Derr v. Chicago, M. & St. P. R. Co.*, 163 Wis. 234, 157 N. W. 753; *Gilman v. Central Vermont R. Co.*, 93 Vt. 340, 107 Atl. 122; *Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109.

Upon the question of fact, the evidence is well-nigh conclusive that the appellants were guilty of negligence which caused the accident.

We see no reason for disturbing the judgment of the trial court, either on the law or the facts, and it is therefore affirmed.

PARKER, C. J., HOLCOMB, HOVEY, and MAIN, JJ., concur.

[No. 16947. Department Two. March 8, 1922.]

NELLIE SLAVIN, *Respondent*, v. CATHERINE ACKMAN *et al.*, *Appellants*.[1]

WITNESSES (44, 47)—COMPETENCY—TRANSACTIONS WITH DECEASED—SUBJECT-MATTER—SERVICES. Testimony as to a letter and its contents received from a deceased person, and of acts and services rendered deceased in conformity with such letter, is not within Rem. Code, § 1211, prohibiting a party in interest from testifying as to transactions with one since deceased.

FRAUDS, STATUTE OF (35, 48)—CONTRACT—DESCRIPTION OF LANDS—POSSESSION—PERFORMANCE. A letter from a mother to a daughter offering to give her home to the daughter if the latter will come and take care of her is sufficient proof of the contract between them though there is no description of the premises, where the daughter went into possession of the home property and completely performed the obligations contemplated by the contract.

QUIETING TITLE (23)—PARTIES. Under a contract by a parent to convey the home place to a daughter upon certain conditions, all of which have been performed, the latter is entitled to a decree quieting her title therein as against another daughter, who, with knowledge of the arrangement, had procured a mortgage of the property from the mother without the advancing of any consideration.

Appeal from a judgment of the superior court for King county, Ralston, J., entered November 8, 1921, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Edward Judd and *F. P. Rutherford*, for appellants.

Farrell, Kane & Stratton, for respondent.

MACKINTOSH, J.—The respondent and appellant are daughters of Ellen Conley, who, at the age of about eighty-six years, died in July, 1920. In June, 1920, she gave to the respondent a deed of all of her property, which consisted of two lots and a house, which she had made her home for many years. In September, 1917,

[1]Reported in 204 Pac. 816.

she had given a deed to the same property to the appellant. This action is to remove the cloud created by the prior deed.

In the year 1910, Mrs. Conley caused a letter to be written to the respondent, who was a widow and was supporting a daughter, living in Troy, New York, and maintaining herself and child by running a lodging house. This letter was as follows:

"Auburn, Wash., August 10, 1910.

"My dear Daughter: .I write you hoping you and Marie are well. Nellie, I want to ask you if you will come out here and take care of me. I am old now, and Kate don't come only when she wants money from me. If you will come out here and take care of me I will give you this little home for taking care of me. . . . Sell all your furniture and you can have mine and Marie can get good work here in the postoffice. . . . Now my dear child, make up your mind and come for I am sick. I need you. . . . Do come to me right away. . . . Come right away for I need you to care for me. You can take roomers and have all you make. . . . I cannot live long and I pray for you to have my little home. Write me if you are coming out. I am still your loving mother.

"(Signed) Ellen Conley."

Upon its receipt, Mrs. Slavin disposed of her property in New York and came to Auburn to her mother's home, where she has continued to reside from the day of her arrival to the day of her mother's death, except for a period of a few weeks when she was excluded from the house by her sister's husband. During all of this time she attended to the wants of her mother, did all the housework, and through her earnings as an employee of a condensery in Auburn she bought the supplies for the home. The pension money received by her mother was insufficient to pay the street assessments, paint the house, and make necessary sanitary

changes, and respondent aided in meeting these expenses, and generally she did everything that was needed to be done to keep the property in condition. Mrs. Slavin rendered such service to her mother as conduced to her health and comfort. In other words, she did everything that was contemplated by the letter above quoted. Mrs. Ackman knew that her mother had written to the respondent, and was informed of all the conditions upon which the respondent had gone to her mother's house. There is nothing in the record to show the reason for giving the deed of 1917 to the appellant; nor was any testimony offered as to the consideration for it. As a matter of fact, the record shows that, after this action was begun to quiet the title, and a few days before the mother's death, Mrs. Ackman reconveyed the property to her mother and had her mother execute a note and mortgage upon the property; and by an amendment to the complaint, the cloud of this transaction is also asked to be removed from the respondent's title.

There are various objections to the decree of the court granting relief to Mrs. Slavin, the respondent. The first of these is that Mrs. Slavin, by virtue of § 1211, Rem. & Bal. Code, was incompetent to testify. It is true that an interested person cannot testify as to any transaction had by him with, or any statement made to him by, any deceased person, but the testimony offered by the respondent while she was on the stand was not as to any transactions with the mother. She testified that she had received the letter hereinabove set out. We have held that such testimony is not testimony as to a transaction with a deceased person. *Bardsley v. Truax,* 64 Wash. 400, 116 Pac. 1075; see, also, *Josephs v. Briant,* 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916E 741; *Bryan v. Palmer,* 83 Kan. 298,

111 Pac. 443; *Dillon v. Gray,* 87 Kan. 129, 123 Pac. 878; *Daniels v. Foster,* 26 Wis. 686.

She also testified as to the acts which she did in conformity with the letter of her mother. We said in *Ah How v. Furth,* 13 Wash. 550, 43 Pac. 639:

"The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him, was not testimony in relation to a 'transaction had by him with, or any statement made to him by,' such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent."

We, therefore, find nothing improper in the testimony of the respondent.

It is next objected that the letter of August 10, 1910, was insufficient under the statute of frauds for the reason that it contained no description of the property, the subject-matter of the contract. Assuming that the statute of frauds has anything to do with the matter, the answer is obvious that this objection is without merit. We held in *Zinn v. Knopes,* 111 Wash. 606, 191 Pac. 822, that where a person entered into possession under, and did things called for by, an instrument it was sufficient to take the question of the improper description in an instrument out of the statute of frauds, so far as the sufficiency of description is concerned.

All of the testimony shows that the contract was completely performed by the respondent. She went into as complete possession as it was possible to take, and at the same time perform the obligations contemplated by the contract. She made valuable improvements and did everything that her mother had made the basis of her agreement to convey. Had there been no writings, these acts would have compelled the performance of a parol agreement. *Coleman v. Larson,*

49 Wash. 321, 95 Pac. 262; *Morgan v. Morgan,* 54 Wash. 406, 103 Pac. 478; *Worden v. Worden,* 96 Wash. 592, 165 Pac. 501; *Velikanje v. Dickman,* 98 Wash. 584, 168 Pac. 465; *Raymond v. Hattrick,* 104 Wash. 619, 177 Pac. 640; *Johnson v. Puget Mill Co.,* 28 Wash. 515, 68 Pac. 867; *Bendon v. Parfit,* 74 Wash. 645, 134 Pac. 185; *James v. Lueders,* 97 Wash. 560, 166 Pac. 772.

The next objection is that witnesses were allowed to testify as to conversations by Mrs. Conley in regard to her intention of giving the home to the respondent. The objection is that these conversations were had not in the presence of the appellant and are, therefore, hearsay and inadmissible. It is not necessary to say more in passing upon this objection than that the case of the respondent was amply proved without this testimony, and, being tried *de novo* in this court, this testimony need not be considered.

It being established that the contract was made between the mother and respondent to convey to respondent the property upon certain conditions, all of which have been performed, and that the sister, the appellant, was cognizant of the entire arrangement, the conveyances to the appellant were void, both the original deed and the subsequent mortgage, and were clouds which the court was correct in removing from respondent's title. 25 R. C. L. 327; 36 Cyc. 761. The judgment is affirmed.

PARKER, C. J., HOLCOMB, HOVEY, and MAIN, JJ., concur.

[No. 16954. Department Two. March 8, 1922.]

Reuben Spahr, *Appellant*, v. Mary Liebeck, *Respondent*.[1]

Pleading (43)—Answer—Inconsistent Defenses—Joinder With General Denial. Assuming, in an action on a promissory note, that the defenses of *non est factum* and the statute of limitations are inconsistent, the defendant would not thereby be cut off from all defense, under a general denial, of matters which he cannot be deemed to have admitted.

Same (174)—Issues—General Denial. In an action on a promissory note alleged to have been given in payment of interest on a prior note, which allegation was specifically denied, it was admissible, under the general denial, to prove that the money for which the note was given was for a loan which the maker obtained to pay indebtedness to another party.

Appeal from a judgment of the superior court for King county, Davidson, J., entered August 8, 1921, upon findings in favor of the defendant as to one cause of action, in an action on promissory notes, tried to the court. Affirmed.

Henry W. Lung and *S. S. Langland*, for appellant.
M. H. Ingersoll, for respondent.

Hovey, J.—Appellant sued respondent upon three promissory notes, the first being for $1,255.50, dated August 15, 1914, and due ninety days after date, the second for $186, dated May 1, 1915, due six months after date, and the third for $135.40, dated October 2, 1916, due six months after date. The complaint was filed July 11, 1921. It alleged payments on the first note of $100 on June 1, 1915, and $113.25 on October 1, 1916. The answer denied the execution of the first note and denied the making of the payments alleged, and alleged affirmatively that no payments on principal

[1]Reported in 204 Pac. 1049.

or interest had been made on the first note, and that the same was barred by the statute of limitations. The reply alleged that the third note, being the one for $135.40, was made for the express purpose of paying $113.25 interest due October 1, 1916, on the first mentioned note, and to pay $22.08 interest on the note for $186. The lower court granted judgment on the second and third notes, but held that the first note was barred by the statute of limitations and denied any recovery thereon, and the appeal is from that portion of the judgment.

The first question raised by appellant is that the defenses were inconsistent, citing *Seattle National Bank v. Carter,* 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, and similar cases. Assuming, without deciding, that the defenses are inconsistent, we differ with appellant as to the consequences. If the effect of the general denial can be said to be overcome by the affirmative plea of the statute of limitations, it would simply result that the plaintiff would not be put to the burden of proving the execution and delivery of the note, under the cases cited. But it does not have the effect that counsel apparently contends for, of cutting the defendant off from all defense as to matters which he will not be deemed to have admitted.

It is next contended that the court erred in admitting testimony showing that the $135.40 note was in fact given for a loan and the money so obtained was used to pay a note which respondent owed to one Frost, and it is claimed that this is a defense which should be pleaded. The payments of interest on the first note were specifically denied, and this proof was admissible under the general denial.

The statement of facts is in narrative form, and as the evidence is there summarized, we cannot say that

the judgment of the trial court is not well founded; in fact, it seems, in our opinion, to preponderate in favor of the judgment.

Judgment affirmed.

PARKER, C. J., HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

[No. 16777. Department Two. March 8, 1922.]

MULLINS SAW MILL COMPANY, *Respondent*, v. L. H. WOOLFOLK, *Appellant*.[1]

APPEAL (145)—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS—NECESSITY. Where exceptions are not taken to findings of fact as signed by the judge, and no error is predicated upon the exclusion of testimony, the statement of facts will be stricken from the record on motion therefor.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered April 30, 1921, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

Vince H. Faben, for appellant.

Raymond G. Wright, for respondent.

PER CURIAM.—In this case the trial court made findings of fact and conclusions of law and entered judgment thereon. No exceptions were taken to the findings of fact as signed. The respondent has interposed a motion to strike the statement of facts for that reason. Under the prior rulings of this court, the motion must be granted, there being no error predicated upon the exclusion of testimony. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Shaw v. Benesh*, 37 Wash. 457, 79 Pac. 1007; *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889; *Crowe & Co. v. Brandt*, 50 Wash. 499, 97

[1]Reported in 204 Pac. 802; 207 Pac. 689.

Pac. 503; *Lauridsen v. Lewis*, 50 Wash. 605, 97 Pac. 663; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026.

The court's findings sustain its conclusions and judgment, and there being no statement of facts before us, there is no question for us to review. The judgment is therefore affirmed.

On Rehearing.

[*En Banc.* June 12, 1922.]

Per Curiam.—This cause was reargued before the court *En Banc* on May 22, 1922. Deeming ourselves fully advised in the premises, and the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, the judgment is affirmed for the reasons therein stated and as therein directed.

[No. 17028. Department Two. March 9, 1922.]

The State of Washington, *on the Relation of Louis C. Smith, Plaintiff*, v. M. L. Clifford, *Judge of the Superior Court for Pierce County, Respondent.*[1]

Assignment for Creditors (14, 28)—Pending Actions—Rights and Remedies of Creditors. Under an assignment for the benefit of creditors, the court assumes complete jurisdiction and the creditors should seek their remedy in that proceeding and not through independent supplementary proceedings in pending actions.

Certiorari to review the action of the superior court for Pierce county, Clifford, J., in continuing proceedings supplementary to execution, after an assignment by the judgment debtor for the benefit of creditors Writ of prohibition granted.

[1]Reported in 204 Pac. 807.

Henry Clay Agnew, for relator.

Wesley Lloyd, for respondent.

Hovey, J.—An application was filed in this court for a writ to review the action of the respondent in continuing proceedings supplementary to execution upon a judgment after the judgment debtor had made an assignment for the benefit of creditors. Upon the hearing it was stipulated by counsel that final disposition should be made of the matter upon the record presented.

It appears from the petition of the relator that he is a married man living with his wife in the city of Seattle, and is by occupation a stage driver working for wages. It is alleged that, as a result of injuries sustained in an automobile accident in which a stage driven by the relator was involved, a considerable number of persons have obtained judgments in the courts of this state against the relator, and there is one additional suit pending, the aggregate sums involved being over $47,000. It is alleged that affiant has no property or income beyond the exemptions allowed him by statute, but that, notwithstanding this, various of the judgment creditors have been and are harrassing the relator by proceedings supplementary to execution. Among the judgments so obtained is that of Sherwood Scott and wife in the sum of $5,800, the same having been obtained in the superior court of Pierce county; and upon this judgment proceedings supplementary to execution have been instituted and the respondent judge has granted a hearing thereon, one examination has been held and the proceedings have been continued for further examination. It is alleged that the relator, with his wife, on December 13, 1921, executed a general assignment for the benefit of all his creditors and the creditors of the

community of all the property belonging to himself and the community, and the same was filed with the clerk of the superior court of King county and with the auditor of said county on said date. In the deed of assignment, O. C. Elliott is named as assignee, and the latter has accepted the assignment and is proceeding with his duties under the same. Notice to the creditors has been given, and Scott and wife were listed in the deed of assignment and notified, but have failed to appear or make any objections to the proceeding. It is next alleged that a showing was made before the respondent judge of the facts aforesaid and a motion made to quash the proceedings supplementary to execution.

It is contended on behalf of the respondent that the making of a general assignment under our law does not prevent the creditor from pursuing his other remedies, and that while he cannot get a preference thereby and any property so discovered would go to the benefit of all the creditors, yet all the remedies may co-exist.

Respondent cites in support of his contention *In re Rutaced Co.*, 137 App. Div. 716, 122 N. Y. Supp. 454. From this case it appears that, in the state of New York, both remedies are open to the creditor.

The effect of an assignment under our statute is defined in *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 333, 32 Pac. 92, as follows:

"An investigation of our particular statute convinces us that the assignee does not derive all his power from the assignment, and that it is not the exclusive guide and measure of his duty. It is true that he obtains primarily his authority to act from the deed of assignment. But the deed of assignment simply inaugurates the proceedings, *and when the court obtains jurisdiction of the proceedings it obtains*

complete jurisdiction. Authority and control over the property are conferred by law upon the court. The insolvent yields to the jurisdiction of the court when he files his deed of assignment. From this time until the final settlement of the estate the court makes orders concerning the control and distribution of the property which are judicial in their nature." (Italics ours.)

Following this case, in *Mansfield v. First National Bank,* 5 Wash. 665, 32 Pac. 789, 999, it was held that the assignee under a deed of assignment can attack a chattel mortgage previously made; and in *Cosh-Murray Co. v. Bothell,* 10 Wash. 314, 38 Pac. 1118, it was held that a creditor could not, during the pendency of the insolvency proceedings, maintain another form of action. In *Jensen-King-Byrd Co. v. Williams,* 35 Wash. 161, 76 Pac. 934, it was held that proceedings supplementary to execution could not be brought after the discharge of the debtor under an assignment for the benefit of creditors.

As pointed out in *Cosh-Murray Co. v. Bothell, supra,* the construction adopted is different from that followed in states having laws governing common-law assignments.

From the foregoing we are satisfied that, under our assignment statute, the court assumes complete jurisdiction of the affairs of the debtor and that the creditor should seek his remedy in that proceeding while it is pending. It is true that in *Fidelity National Bank v. Adams,* 38 Wash. 75, 80 Pac. 284, we sustained an action to set aside a fraudulent conveyance after an assignment had been made, but in that case the assignment was completely closed and it was charged that the entire proceeding was fraudulent and thereby sought to be set aside and it was too late for the

creditor to secure his remedy in the assignment proceedings.

It is ordered that a writ of prohibition issue restraining the respondent from proceeding further in the matter under review.

PARKER, C. J., MITCHELL, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16842. Department Two. March 9, 1922.]

C. O. RUDE, *Respondent*, v. COULTER TOW BOAT COMPANY, *Appellant*.[1]

LANDLORD AND TENANT (4)—LEASE—EXISTENCE OF RELATION—EVIDENCE. A finding of a verbal lease for 115 months at six dollars per month is not sustained where respondent was the only one who testified to the fact, he was squarely contradicted, and never made any claim for rent during the entire period, and services rendered offset any claim for use and occupation.

PLEADINGS (104) — AMENDMENT — NECESSITY — QUANTUM MERUIT. An action for stated rent cannot be sustained upon the theory of quantum meruit where there was no amendment and no proof thereof offered.

Appeal from a judgment of the superior court for Pacific county, Reynolds, J., entered May 28, 1921, upon findings in favor of the plaintiff, in an action for rent, tried to the court. Reversed.

Fred M. Bond, for appellant.

Edward M. Connelly and *Welsh & Welsh*, for respondent.

MACKINTOSH, J.—The plaintiff wants six dollars a month as rental of a tract of land for a period of one hundred and fifteen months, or $690.

His complaint and his evidence are that, on April 10, 1909, he entered into a verbal lease and agreement

[1]Reported in 204 Pac. 801.

with the appellant by which he leased the premises at that rate, payable each and every month. The appellant, who was already in possession, continued there until November 10, 1917. The appellant denies that any lease had ever been made. The trial court found there had been one made—we are compelled to find from the evidence that there was no lease. The testimony preponderates so greatly against the trial court on this question that we are forced to reverse the case.

The respondent himself was the only one who testified to the making of the lease, and he is squarely contradicted by the manager of the appellant, with whom he testified he had the conversations on the subject. The respondent is also contradicted by the attendant facts and circumstances, some of which are that, for the entire period, no claim was ever made for any rent, no bills presented, and no efforts made towards collection. We are satisfied that the property was occupied under a mutual understanding that courtesies would be exchanged between the respondent and the appellant, and that the appellant's services in hauling sand and gravel and other material for the respondent were intended to, and did, offset any compensation for the use of the respondent's property.

Some suggestion is made that the respondent might be entitled to recover for the reasonable value of the use of his property. The complaint is put squarely upon a verbal lease with a fixed rental. No amendment was asked for at the trial, if that had been permissible. There was no change of the action to one of *quantum meruit,* nor was any testimony introduced upon that theory.

For the reasons stated, the judgment is reversed.

PARKER, C. J., HOLCOMB, MITCHELL, and HOVEY, JJ., concur.

[No. 16638. Department Two. March 9, 1922.]

In the Matter of the Estate of S. G. HILL. FRED D. HILL, *Respondent*, v. GEORGE W. UPPER, *Appellant*.[1]

CHARITIES (1, 2) — VALIDITY — PURPOSES — PUBLIC POLICY. A residuary devise is void as detrimental to public health and against public policy where it provided for the teaching of a system of treatment confined to the doctrine of certain named text books which advanced medical science and the testimony almost conclusively shows would result in sickness and death (HOVEY, J., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 7, 1921, upon findings in favor of the plaintiff, in an action to construe a will, tried to the court. Affirmed.

Kerr, McCord & Ivey (*Weightstill Woods*, of counsel), for appellant.

H. D. Moore, H. N. Moore, and *Thomas L. Marshall*, for respondent.

MAIN, J.—The purpose of this action was to construe a paragraph in the will of S. G. Hill, deceased. The petitioner was an heir and the defendant was the executor. The trial resulted in findings of fact, conclusions of law and a judgment holding that the paragraph of the will in controversy was void and the property sought to be disposed of thereby would pass to the heirs of the deceased. From this judgment, the executor appeals.

S. G. Hill died in the city of Seattle sometime during the month of May, 1919. His will was admitted to probate on the second day of June of that year. Thereafter the respondent brought this action for the pur-

[1]Reported in 204 Pac. 1055; 207 Pac. 689.

pose of testing the validity of one paragraph of the will. It will not be necessary here to set out in full the will or the paragraph involved, but only such portions as are material to present the question to be determined. The testator, after stating that he recognized the effectiveness and curative value of homeopathic remedies and treatment as outlined in certain books hereinafter named in the excerpt from the will quoted, and deploring the present lack of instruction in schools of medicine, directed the trustee named in the will to invest the residue of his estate in bonds and apply the income in perpetuity, after deducting the expense of handling the trust, to pay for the services of a competent homeopathic physician or physicians who should give instruction "at or near" some reputable homeopathic school of medicine in the United States

"to demonstrate to said students the effectiveness of said homeopathic remedies and treatment in cases of chronic diseases; said physician in said lectures and clinics, shall use as text books and confine the instruction to the proposition, principles and methods laid down in Hahnemann's Organon of the Art of Healing; The Nature of Chronic Diseases (Hahnemann's), and J. T. Kent's Lectures on Homeopathic Philosophy, and also shall be required to teach his students the use and application of Kent's Repertory of Homeopathic Materia Medica.

"Said trustee shall have the power to select, replace and remove said physician, and the selection from time to time of the homeopathic school, of medicine, at or near which said physician shall teach.

"The instruction and clinics to be free and open to all students of medicine who may desire to avail themselves thereof.

"Realizing that many schools of medicine and numerous physicians are antagonistic and apathetic in regard to the homeopathic principles and methods

herein referred to, it is my will and wish that said trustee and its successors exercise care and diligence in determining the qualifications of said physicians as they may appoint hereunder and of the medical school or schools, at or near which said physician shall teach, to the end that there shall be no subversion or distortion of the instruction and information which I desire may become available to such students in medicine who may desire to receive the same."

This excerpt from the will, it will be noticed, provides that a homeopathic physician, who shall give the instruction, shall be confined to "use as text books and confine the instruction to the proposition, principles and methods laid down in Hahnemann's Organon of the Art of Healing; The Nature of Chronic Diseases (Hahnemann's), and J. T. Kent's Lectures on Homeopathic Philosophy, and also shall be required to teach his students the use and application of Kent's Repertory of Homeopathic Materia Medica." The latter clause in the will shows that the books mentioned shall be taught without any "subversion or distortion." The trial court found that if the principles, theories and methods of the books mentioned should be taught without any subversion or distortion, as required by the will, that it would lead to sickness and death, corresponding to the extent that they were followed by medical students, and would do great harm to the public health. And further, that the teaching of the books, without subversion or distortion, would tend to deprive the sick from receiving proper and adequate treatment which is recognized by modern science as being necessary in curing disease and relieving pain and suffering.

Upon the trial there was testimony by physicians who practiced according to the methods and principles of the allopathic school, and also those who practiced

according to the principles and methods of the homeopathic school. This is not a controversy between the two schools. Disregarding entirely the testimony of the allopathic physicians and looking only to the evidence of those testifying who belonged to the homeopathic school, the great weight of the evidence sustains the finding or conclusion of the trial court that, if the books mentioned were taught without subversion or distortion, it would lead to sickness and death and would deprive ailing persons from receiving treatment which is recognized by the modern homeopathic school. It might be said that the evidence almost conclusively established this fact. The evidence shows that, since the books mentioned were written, there has been a large development in medical science as practiced by the homeopathic school and that the books are not modern, and if the principles and methods there taught only were applied in the healing of disease that it would be detrimental to the public health.

Since the evidence shows that the teaching of the books without a subversion or distortion would be inimical to the public health, the question arises whether the bequest for this reason is void. It can hardly be doubted that, if it were a bequest which tended to support an immoral purpose as recognized by modern standards of correct conduct, the will would be void for this reason. We do not understand the appellant to contend otherwise. If a will making a bequest for an immoral purpose should be declared void, by the same course of reasoning it would follow that, when providing for the teaching of medicine which would be detrimental to the public health, it would likewise be illegal and could not be carried into effect. In other words, in such a case it becomes the duty of the court to declare that the bequest is void on the ground

of public policy. Speaking on this question in *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, the court said:

"The courts will not enforce contracts or the payment of legacies which are against public policy. But it is not always easy to determine when contracts and legacies are against public policy. Some cases are plain and have been settled by the repeated decisions of the courts. Contracts tending to undermine public morals, to endanger the public health or the public safety, to prevent competition at judicial sales, to improperly influence legislation or the action of public officers or the administration of justice, and to unreasonably restrain trade or marriage; all these have been condemned as against public policy."

If the bequest had not been limited to instruction in the books mentioned, without subversion and distortion, and had recognized that the principles and methods of these books were to be taught in connection with the modern methods of the homeopathic school, an entirely different question would be presented. As the record stands, the bequest and the teachings required thereby are not supported by any modern school of medicine.

It is claimed that the bequest was void also on other grounds, but these need not be considered, because the bequest being void on the ground of public policy disposes of the case.

The judgment will be affirmed.

Parker, C. J., Holcomb, and Mackintosh, JJ., concur.

Hovey, J. (dissenting)—I dissent. The testator had an undoubted right to make such disposition of his property as he saw fit, unless the purpose can be said to be illegal. He chose for his subject a system of medicine which appears to be out of date, but that

was his privilege, even though it may seem a waste of a large sum of money. The testimony offered was from physicians of modern schools and the method proposed was, in their view, not proper medical treatment, and they drew as conclusions that the proposed system would be ineffective, but there was nothing to the effect that it would be injurious. The bad results would follow, in their opinion, from a lack of some treatment approved by them. For the courts to say what is or is not the proper method of treating the sick or afflicted is entirely beyond their province. It is possible that the bequest is invalid because of impracticability of performance, but that is not the ground of the decision.

On Rehearing.

[*En Banc.* June 20, 1922.]

Per Curiam.—This cause was reargued before the court *En Banc* on June 1, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, *ante* p. 62, 204 Pac. 1055, the judgment is affirmed for the reasons therein stated and as therein directed.

[No. 17037. Department Two. March 9, 1922.]

CARL S. WEATHERWAX *et al., Appellants,* v. GRAYS HARBOR COUNTY *et al., Respondents.*[1]

DRAINS (4)—ESTABLISHMENT BY COUNTIES—WITHIN CITIES. The legislature had the power by Laws 1921, p. 646, § 1 [Rem. Comp. Stat., § 4405] to establish a drainage district "whether wholly or partly within the limits of any incorporated city."

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered December 24, 1921, in favor of the defendants, after a trial to the court upon an agreed statement of facts, dismissing an action to enjoin the establishment of a drainage district. Affirmed.

A. E. Graham, for appellants.

E. E. Boner, for respondents.

MAIN, J.—The plaintiffs, as tax payers, brought this action to enjoin the county commissioners of Grays Harbor county from proceeding with the organization of a drainage district. The cause was tried upon an agreed statement of facts and resulted in a judgment of dismissal, from which the plaintiffs appeal. The property embraced within the proposed district is almost wholly within the corporate limits of the city of Aberdeen. The portion which is without such limits is so small that it may be considered negligible, so far as this proceeding is concerned. The case will be treated as though the property embraced within the boundary of the proposed district were entirely within the corporate limits of the city. The question to be determined is whether the county commissioners have authority to establish a diking and drainage district

[1]Reported in 204 Pac. 1058.

within the corporate limits of the city of Aberdeen. In *Weatherwax v. Grays Harbor County,* 116 Wash. 212, 199 Pac. 303, a similar question was before this court upon the statutes as they existed at the time that the decision was rendered. In the opinion in that case there is a comprehensive review of the diking and drainage district statutes and it will not be necessary here to cover these statutes in detail. It was held in that case that, where the property to be embraced within the proposed diking and drainage district was situated entirely within the limits of an incorporated city or town, that district could not be organized under ch. 176, Laws of 1913, p. 611 (Rem. Code, § 4226-1), as amended by ch. 130, Laws of 1917, p. 517, but that in such a case the organization must be under ch. 115, p. 271, and ch. 117, p. 304, Laws of 1895. [1]The proposed district in that case was sought to be organized under the Laws of 1913, as amended in 1917. In this case the district is sought to be organized under the laws just referred to, as amended by ch. 160, Laws of 1921, p. 646, which read as follows:

"Whenever one or more persons whose land will be benefited thereby shall desire to have improvements constructed for the drainage or protection from overflow, or both, of any continuous body of lands situated in the same county, whether wholly or partly within the limits of any incorporated city or town, proceedings for the construction of such improvements may be had as provided in this act." [Rem. Comp. Stat., § 4405.]

The clause, "whether wholly or partly within the limits of any incorporated city or town," does not appear in the Laws of 1913 and 1917, but is inserted in the amendatory act of 1921. Here is the declara-

[1]NOTE: See Rem. Comp. Stat., §§ 4405 and 4236.

tion of the legislature expressly conferring the power to organize a drainage district within the corporate limits of the city by petition to the county commissioners, as provided for in the Laws of 1913 as amended in 1917. It is argued that since, under the holding in the case referred to, the organization of a drainage district within the corporate limits of a city should be had under the Laws of 1895, the language in the act of 1921 is not sufficient to repeal by implication the act of 1895. It is not necessary in this case to determine whether there has been a repeal by implication. It is sufficient to say that the legislature, by the act of 1921, expressly conferred power to organize a drainage district which was within the corporate limits of the city, by petition to the board of county commissioners. Whether a city or town may also proceed under the Laws of 1895 will be left for future determination. The legislature had the power to confer upon the board of county commissioners power to organize a drainage district within the corporate limits of a city. *Paine v. Port of Seattle,* 70 Wash. 294, 126 Pac. 628, 127 Pac. 580; *Foster v. Commissioners of Cowlitz County,* 100 Wash. 502, 171 Pac. 539.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16790. Department Two. March 9, 1922.]

MARGUERITE ANDERSEN, *Respondent*, v. ANDREAS ANDERSEN, *Appellant*.[1]

DIVORCE (36)—EVIDENCE—CRUELTY—SUFFICIENCY OF FINDINGS. A finding that each of the parties have used abusive language to each other and in times of extreme temper used physical force against each other, sustains a decree of divorce on the ground of cruelty.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 24, 1921, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Clarence L. Reames, for appellant.

W. W. Montgomery, for respondent.

PER CURIAM. — The sole question in this case is whether the finding by the trial court that, "for some years last past both the plaintiff and the defendant have used abusive language to each other, and that in times of extreme temper each has used physical force against the other," is a sufficient finding to allow the court to grant a divorce.

Although the finding does not set out all the facts which might have been embodied in it, we take it that it is sufficient to constitute a finding of cruelty, which, under our divorce statutes, is sufficient ground for granting a decree.

For that reason, the judgment of the trial court is affirmed.

[1]Reported in 204 Pac. 795.

[No. 16854. Department One. March 10, 1922.]

ABRAHAM POLISKY *et al., Appellants,* v. PUGET SOUND ELECTRIC RAILWAY, *Respondent.*[1]

APPEAL (142)—EXCEPTIONS TO INSTRUCTIONS. Error cannot be predicated upon the giving of instructions to which no exceptions were taken.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 28, 1921, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

P. L. Pendleton and *Gordon & Nolte,* for appellants.

F. D. Oakley, for respondent.

PER CURIAM. — This is a personal injury action. There was a verdict for the defendant. Plaintiffs have appealed.

The first three assignments of error relate to instructions to the jury, to which no exceptions were taken. Under our uniform holdings they will not be reviewed upon appeal. *Worthy v. Arctic Co.,* 114 Wash. 435, 195 Pac. 222. The other three assignments of error are that the instructions as a whole are inconsistent, that the court erred in denying the motion for a new trial, and erred in entering judgment upon the verdict. They are in no way argued in the briefs. However, upon an examination of the record, we are satisfied that none of the assignments is well taken.

Affirmed.

[1]Reported in 204 Pac. 779.

[No. 17094. Department One. March 13, 1922.]

THE STATE OF WASHINGTON, *on the Relation of W. C. Pendleton, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

STATUTES (74)—CONSTRUCTION—PROVISOS. The ordinary purpose of a proviso being to except something from the operation of the act, it should not be given the effect of changing the entire purport of the act.

OFFICERS (19)—TERM—CHANGE. Under the rule that a statute should not unnecessarily be construed to shorten a term of office, Laws 1921, p. 179, § 2 and p. 180, § 4 [Rem. Comp. Stat., §§ 5144, 5146], changing the time for holding certain municipal elections, and providing for a different time for the beginning and ending of the terms, the incumbents at the time of the taking effect of the act hold to the end of the term for which they were elected, and until the time fixed for the commencement of the term of a successor; and the act was not intended to disturb the rotation of officers theretofore elected at different times.

SAME (19, 20)—TERM—CHANGE—HOLDING OVER. Laws 1921, p. 179, § 2 and p. 180, § 4 [Rem. Comp. Stat., §§ 5144, 5146], changing the time for holding certain municipal elections and providing a later time for the beginning of the terms, whereby incumbents hold over, does not violate Const., art. XI, § 8, prohibiting the extension of the term of an officer beyond the term for which he was elected, where it appears that all such incumbents were elected for a named period of time "and until their successors are elected and qualified."

Certiorari to review an order of the superior court for King county, French, J., entered February 9, 1922, denying a writ of mandamus. Affirmed.

Harry A. Rhodes, for relator.

Henry W. Pennock, Malcolm Douglas, and *Ewing D. Colvin*, for respondent.

Shorett, McLaren & Shorett, Edward R. Taylor, and *Preston, Thorgrimson & Turner, amici curiae.*

[1]Reported in 204 Pac. 1053.

FULLERTON, J. — On January 31, 1922, the relator, W. C. Pendleton, tendered for filing to the secretary of the board of directors of Seattle School District No. 1, King county, a petition, signed by the requisite number of voters, praying that he become a candidate for the office of school director for the school district named, "for one of the terms commencing on the first Monday of January, 1923," and praying further that his name be placed upon the official ballot as a candidate for such office to be voted upon at the election to be held on the first Tuesday after the first Monday in May, 1922. The secretary of the board declined to file the petition or to place the name of the relator on the ballot for the stated reason that no vacancy would exist in the office named on the first Monday in January, 1923, or any time prior to the election to be held in May of that year. The relator thereupon instituted proceedings in mandate in the superior court of King county to compel the secretary to comply with the petition. On the hearing, the superior court entered an order denying the writ, and the proceeding now before us is a proceeding brought to review the order.

To an understanding of the controversy presented, it may be well to briefly review the legislation giving rise to it. Prior to its session in 1921, the legislature had, by various enactments, provided for the organization of numerous municipal and quasi-municipal corporations, under the designation of cities, towns, townships, school districts, park districts, irrigation districts, diking improvement districts, river improvement districts, commercial waterway districts, and perhaps others of a like nature, all of which are governed or controlled by elective officers. While the laws authorizing the creation of these municipalities are general, and operative for the benefit of all com-

munities similarly situated, they were usually enacted at the bequest of some particular locality, and the election day appointed for the election of the governing officers was usually fixed to meet the exigencies of the particular case. The result was that many of the municipalities had different election days, and when these municipalities became overlapping, as many of them did subsequently so become, the same locality had a series of elections, imposing upon it needless waste in the expenditure of time and cost. The legislature, for the commendable purpose of consolidating these numerous elections, enacted the statute found in ch. 61, Laws of 1921, p. 179. By the second section[1] of the act it is provided that all elections in the municipalities enumerated, with certain exceptions not necessary here to be noticed, shall be held on the first Tuesday after the first Monday in May in the year in which they may be called, and by the fourth section (Laws of 1921, p. 180), it is enacted:

"The term of every city, town and district officer elected under the provisions of this act shall begin on the first Monday in June following his election: *Provided, however,* That any person elected to office at the first election held under this act shall not take office until the expiration of the term of office of his predecessor; and *Provided further,* That any person whose term of office shall expire prior to the holding of the first election under this act, shall continue to hold office until his successor is elected and qualified." [Rem. Comp. Stat., § 5146.]

The effect of the act, it is at once apparent, was to change the beginning and ending of the term of office of every officer whose term did not begin on the first Monday in June following his election, and, as there were few of such officers whose terms did so begin, the

[1]NOTE: See Rem. Comp. Stat., § 5144.

change was practically universal. The situation is further complicated by the fact that the governing body of the several municipalities ordinarily consists of a number of persons holding for terms longer than one year, which commence at different annual periods, so that a less number than the total number of the board, and generally a less number than a majority, are elected annually; the evident purpose of the legislature being to prevent those sudden reversals or changes in governing policies which an election of all or of a majority of the board at one time might entail.

The school district with which we are immediately concerned is a school district of the first class. It is governed by a board of five directors, each elected for a term of three years. By the provisions of the statutes existing prior to the statute cited, these officers were elected at annual elections held on the first Saturday in December of each year, two of such officers being elected at one election, two at another, and one at the third; the term of office beginning on the first Monday in January following the election. While it is not made clear by the record, we gather that one of the present directors was elected at the December election of 1918, that two were elected at the December election in 1919, and that two were elected at the December election in 1920. As the statute of 1921 went into effect in June of that year, no election was held in the following December; the director whose term would naturally have ended in January of 1922, holding over at the present time. His successor will, of course, be elected at the election to be held in the coming month of May.

The specific question presented here is, when are the successors of the directors elected in 1919, and whose terms of office will nominally expire on the first

Monday in January, 1923, to be elected. It is the relator's contention that they are to be elected at the coming May election, for a term of three years commencing on the first Monday of June following, although, because of the first proviso of § 4 of the act, they will not take office until the first Monday in January, 1923, the expiration of the term of office of the directors elected in 1919. On the other hand, the respondent contends that the act contemplates only the election at the coming May election of a successor to that director whose term of office has fully expired, and that the successors to those whose terms expire in January, 1923, are to be elected at the election in May, 1923.

While the language of the act seems clear enough upon its face, it becomes obscure when an attempt is made to apply it to the different situations to which it relates. The framers of the act, although recognizing that there must be necessarily a shortening of the terms of either the existing officers or of the newly elected officers, evidently thought that the readjustment would take place at the first election held under the act, overlooking the fact that the process of adjustment would continue in all instances to the second election, and in some instances to the third and fourth. The provisos, therefore, speak of the first election only, making no reference to the subsequent elections equally affected. The inquiry then is, does the act mean that at each May election there shall be elected successors to all officers whose terms will expire between that election and the next one, the officers elected at the first election to take office at the expiration of the terms of their predecessors, and those elected later to take office on the first Monday in June following their election, regardless of the unexpired terms; or

does it mean that successors shall be elected to succeed those whose terms have fully expired, permitting the incumbent officers to hold during the interval between the expiration of their terms and the subsequent election.

It seems to us that the latter of these propositions is the one intended by the legislature. Such would be the natural meaning of the words used were it not for the first of the provisos of § 4 of the act. But to say that the proviso has the contrary effect is to allow the proviso to change the entire purport of the act. This is not the usual office of a proviso. Ordinarily its purpose is to except something from the operation of the act which otherwise would be included within it. Here the proviso makes provision only for the first election held under the act. It says nothing concerning other elections. The obvious inference is that these are left to be controlled by the general provisions, and the rule is that statutes will not be construed to shorten the terms of incumbent officers unless the intent is plainly and clearly expressed.

Another circumstance supports the view we adopt. As we have before indicated, the legislature has taken pains to provide for the election of the officers comprising the governing boards of these different municipalities in rotation, that is to say, it has provided that less than a majority of the board shall be elected at any one election. It is at once apparent that, to adopt the other construction suggested, would change the order of these elections. With respect to the school district board now before us, it would be to elect three members at the first election, two at the second, and none at all at the third; whereas the adopted policy has been to elect them in the order of two, two and one. With respect to certain others of the municipali-

ties affected, the result is more marked. In cities of the fourth class, for example, which are governed by a board of five councilmen, all five would be elected at the first election, and none at all at the second. The same result would follow in the election of councilmen in cities of the second class, the only difference being that the councilmen number twelve instead of five. This would be a radical change in existing policy, and it is difficult to believe the legislature so intended.

It is argued that the foregoing construction has the effect to extend the term of an officer beyond the term for which he is elected, and is thus in violation of § 8, art. XI, of the constitution. But an examination of the statutes under which these several boards are elected will show that they are elected not only for a named period of time, but "until their successors are elected and qualified." Since the legislature and not the constitution fixes the term, the time elapsing between the end of the definitely named period and the election and qualification of the successor is a part of the officer's term, and the term is not extended in the constitutional sense by an act of a subsequent legislature fixing the time for the election and qualification of a successor at a later period than it was fixed in the act creating the office. *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Vanderveer v. Gormley*, 53 Wash. 543, 102 Pac. 435.

Our conclusion is that the trial court did not err in its judgment, and the same will stand affirmed.

PARKER, C. J., MACKINTOSH, MITCHELL, and HOLCOMB, JJ., concur.

[No. 16453. *En Banc.* March 13, 1922.]

FRANK BELKIN, *Respondent*, v. SKINNER & EDDY CORPORATION, *Appellant*.[1]

MASTER AND SERVANT (98, 110, 161, 163)—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—SAFE PLACE—QUESTION FOR JURY. It cannot be said as a matter of law, that a riveter at work on a vessel requiring rapidity and constant attention, was guilty of contributory negligence or assumed the risk, where he fell from a scaffold, which was one plank narrower than customary, and which, at the point in question, was pushed under the deck some five or six inches; but the question is for the jury (TOLMAN, MACKINTOSH and MITCHELL, JJ., dissent).

SAME (170)—INSTRUCTIONS—ASSUMPTION OF RISKS. An instruction that to charge a servant with assumption of risks, it must appear that he knew and appreciated the danger is erroneous in not also charging him with assuming the risk and danger which, in the exercise of reasonable care, he should have known and appreciated.

TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY THE EVIDENCE. An instruction on the assumption of risks and the effect of momentary forgetfulness of a danger is prejudicial error where there was no evidence in the case as to momentary forgetfulness of the danger.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 23, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a riveter employed in the construction of a vessel. Reversed.

J. Speed Smith, Henry Elliott, Jr., and *Hastings & Stedman*, for appellant.

Jay C. Allen and *J. W. Russell*, for respondent.

BRIDGES, J.—The respondent was injured while riveting a beading around the hatch of a vessel being con-

[1]Reported in 204 Pac. 1046.

structed by the appellant. The latter appeals from a judgment based on the verdict of the jury awarding respondent damages.

There was testimony tending to show the following facts: The respondent was an expert riveter. Three persons work with him; one heats the rivets or bolts to a white heat and throws them, one at a time, to a companion, who inserts them, while still very hot, in the holes which they are to fill. Immediately another man holds a heavy crowbar, or like instrument, against the rivet, and the riveter, with an automatic machine, at once does the driving. All of this work must be done while the rivet is nearly white hot. The riveting machine is spoken of as a "gun" because of its resemblance to that instrument. It is operated by compressed air, and strikes about 1,800 blows a minute. It has a recoil similar to that of a gun. In order that he may not be knocked off his balance by the recoil, the riveter must brace himself by putting one foot back of the other. The work must be done with great rapidity. It takes about thirty seconds or a little more to drive each rivet.

About four o'clock of the day of the injury, one of appellant's foremen directed respondent to rivet the beading around one of the hatches. At that time respondent asked the foreman if the necessary staging was prepared, and he was informed that it was, and that he should work overtime, up to six o'clock if necessary, because it was required that the boat should be finally completed on a definite near date. The beading to be riveted was on the combing of the hatch where it connects with the deck of the boat. The hatch in question was about thirty feet long by eighteen feet wide. It was customary at the plant in question and elsewhere for the staging upon which the

riveter would stand to consist of three planks placed side by side and each about a foot in width, and to extend around the sides and ends of the hatch. The staging customarily comes up nearly flush with the base of the hatch combing, and extends out into the hatch opening, that is, over the hold, some three feet or a little more. In this particular instance, but two planks were used to make the staging, each a foot wide, thus making the staging a little more than two feet in width. This staging was constructed around both sides and at one end of the hatchway, but at the other end there was no planking upon which the riveter might stand.

The respondent commenced his work on one side of the hatchway, at the corner where planking was laid across the end of the hatch. At that point the side staging was practically flush with the base of the combing, thus allowing something more than two feet of planking upon which the respondent might do his work. But this side planking, as it approached the other end of the hatch, was, for some reason, pushed in under the deck to the extent of some five or six inches, so that, as respondent approached the end where there was no planking, the platform on which he was required to stand was only about eighteen inches wide. While he was riveting on the side of the hatch, at a point some eighteen inches or two feet from the end where there was no planking, he stepped back for the purpose of bracing himself, but his foot went out beyond the planking and he fell several feet and was seriously injured. The testimony tended to show that, had there been planking or a platform across the end of the hatch near which he was working, his foot would have found a hold on that portion of the planking and he would not have fallen, nor probably would he have fallen had the staging along

the side of the hatch been parallel with the combing and not pushed in under the deck five or six inches.

Appellant's chief argument is that respondent fell as a result of his own carelessness, or, if the staging was defective, he should have known it, and consequently assumed the risk of working on it. Unquestionably the general rule is that the master must furnish his servant with a reasonably safe place in which to work; but it is equally well established that the servant may not blindly rely upon this duty of the master, for he must use some care and caution for his own welfare and protection. In other words, the servant will be held bound to observe those defects in a place where he is put to work which are perfectly open and obvious, and which a person of ordinary care and caution, working under like circumstances, would observe. But whether, in a particular instance, a servant must, as a matter of law, observe the defects and appreciate the dangers depends, to a large extent, upon the particular circumstances surrounding him and the opportunity given him to make such observations. The rule is very clearly stated by Mr. Justice Harlan, in *Kane v. Northern Central Railway Co.*, 128 U. S. 91, 32 L. Ed. 339, as follows:

"But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

The respondent's testimony tended to show that he relied upon the assurance of the master that the staging had been constructed and was ready for him, and that, because of the great rapidity with which he was required to do the work, he did not have much opportunity to make observations concerning the safety of

the staging. He says that he did observe that the staging appeared to be constructed along the entire side of the hatchway upon which he was working, but that he did not observe that one end of it was pushed some five or six inches under the deck of the vessel, nor did he observe that the end he was approaching and where he fell had no planking whatsoever. When we take into consideration, as we must, the rapidity with which the respondent's work must be done, and that each rivet must be driven while it is very hot, and that the instant he has completed driving one rivet his companions have placed another in position to be at once driven, and that the rivets in this particular instance were about six inches apart, and that the work was being done by an instrument which required the riveter to almost constantly give his attention to the work he was doing, we cannot say, as a matter of law, that the respondent was bound to see the alleged defects in the staging.

Appellant has cited many cases from this and other courts in support of its argument on these questions. We do not think any of them are controlling. Whether one has, as a matter of law, assumed the risks or has been guilty of negligence depends largely upon the circumstances and conditions surrounding him. In certain cases the court may say that a plaintiff must, of necessity, have seen the defects and appreciated the dangers, while under other circumstances the court would not feel like so declaring, and such is the situation here. We think the trial court properly submitted to the jury the questions of assumption of risk and contributory negligence.

Appellant complains of the following instruction given by the court:

"In order to charge a servant with assumption of risk it is necessary that it be made to appear that the

servant knew and appreciated the danger from which such injury resulted. Where a servant is ordered to do an act involving peril to himself, the order contains an assurance of safety, and the servant has a right to obey the order unless the danger is so open, obvious and imminent that no person of ordinary care and prudence would encounter it."

This instruction was erroneous because it failed to inform the jury that the respondent not only assumed the risk and danger which he knew and appreciated, but also those which, in the exercise of reasonable care under all the circumstances, he should have known and appreciated. Respondent seems to admit that the instruction might be erroneous as applied to many circumstances, but that it was correct in this case because the master had ordered this work to be done by the respondent, and had told him that the staging was prepared for him, and under those circumstances there was no duty devolving upon him to make any investigation for his own safety. If it be conceded that there is any exception to the general rule, it would be in instances where the master was present and directing the manner in which the work should be done. Here the facts are that the master was not present and was not directing the work. The respondent was simply directed to do the work, and the manner of doing it was entirely left to him. The instruction as given would not impose any duty whatsoever upon the servant to observe defects and dangers, even though they were perfectly open and obvious. Such is not the correct rule.

The appellant complains of the following instruction given by the court:

"I charge you that if the servant is injured by danger which is known to him, or which in the exercise of care and intelligence on his part should have

been known, yet if, in a moment of forgetfulness, while in the discharge of his duties, and owing to the haste required to perform such duties, he momentarily forgets such danger, and in such moment of forgetfulness is injured, that does not in law preclude a recovery. That is, the minute that fact appears it is not proper for the law to say, you cannot recover because you knew of the danger and you forgot it. That is a fact and circumstance which you may take into consideration with all other facts and circumstances in determining the character of the danger and determining the question of whether the servant was guilty of negligence."

One of the objections made to this instruction is that there is no testimony upon which to base it. We are required to hold that this objection is well taken. We have very carefully read the respondent's testimony as it appears in the statement of facts, and we are unable to find any intimation that he was injured because he momentarily forgot the dangers or defects of which he complains. On the contrary, the testimony shows that he did not know whether there were two or three planks on the staging upon which he was working, and that he did not know that the planks along the side of the hatch where he was working were in part pushed under the deck of the boat, and that he did not know that there was no planking at the end of the hatchway where he fell. Manifestly, if he did not know of these defects or dangers, he could not have forgotten them. Nor can we say that this instruction was harmless. At best, the doctrine of "momentary forgetfulness" has a tendency to defeat and annul the doctrines of contributory negligence and assumption of risk and should not be applied to all cases and circumstances, and where it is applied it is manifest that it is a doctrine which must clearly influence the case and the conclusions which may be

reached by the jury. In other words, when this doctrine is applied to a case it is of vital importance. Because there was no testimony upon which to base this instruction, we do not feel called upon to determine whether or not the instruction would have been proper in a case of this character, had there been testimony tending to show that the injury resulted from momentary forgetfulness.

For the errors noted, the judgment is reversed and the cause remanded for new trial.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

TOLMAN, J. (dissenting)—I am unable to concur in that part of the opinion which holds that respondent did not assume the risk as a matter of law. There were no concealed defects in the scaffolding. The light was good and respondent testified that he could have seen if he had looked. The limitations of the scaffolding were perfectly open and apparent, and under these conditions reasonable minds may not differ. It was the duty of respondent to use some care for his own safety, and the slightest and most superficial observation upon his part when he went upon the scaffolding would have fully advised him of the danger of the situation. Under these conditions he should be held to have assumed the risk, and the action should be dismissed.

MACKINTOSH and MITCHELL, JJ., concur with TOLMAN, J.

[No. 16818. Department Two. March 13, 1922.]

Sadie M. Wilson, *Respondent*, v. I. A. Fay *et al.*, *Appellants*.[1]

Vendor and Purchaser (64)—Rescission by Purchaser—Estoppel. A contract for the purchase of a rooming house will not be rescinded because of the vendor's failure to deliver a copy of the contract, where the purchaser remained in possession and made payments called for by the contract at a bank where the copy was kept.

Same (63, 65)—Rescission by Purchaser—Defect in Title—Conditions Precedent. A contract for the purchase of a rooming house will not be rescinded without tender of performance by the purchaser, because of an alleged incumbrance or lien, contrary to the representations of the vendor, where the purchaser had not been disturbed in her possession.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered May 24, 1921, upon findings in favor of the plaintiff, in an action for rescission, tried to the court. Reversed on defendants' appeal.

Robert M. Jones, for appellants.

Gill, Hoyt & Frye and *R. L. Blewett*, for respondent.

Hovey, J.—As both parties to this action are appealing, we will continue to refer to them as plaintiff and defendant. The plaintiff brought an action for the rescission of a contract which she and her son had made with the defendant for the purchase of some residence property in Seattle. The contract was made November 25, 1918, and the purchase price was $2,500. The contract provided for an initial payment of $200 and monthly payments of $25 each, with interest at seven per cent, payable monthly. There has been paid

[1]Reported in 204 Pac. 800.

upon the contract a total of $930. The trial court entered judgment rescinding the contract, but requiring the plaintiff to credit upon the amount to be recovered from the defendant an allowance for rental for the use of the property, and the judgment is for the sum of $451.69. The contract was in duplicate, one copy being retained by the defendant and the other copy placed with a bank where plaintiff made her payments.

The grounds of rescission were that defendant had agreed to give the plaintiff a copy of the contract, which he refused and failed to do, and that defendant had represented the property as being clear of incumbrances, when in fact there was a mortgage for $1,500 upon this and other property. Plaintiff offered testimony to support these allegations, and the defendant admitted that there was a mortgage upon the property which he had paid off and which was released of record before the suit was brought, and denied the other representations alleged.

As to the first ground of complaint, even though we accept plaintiff's version of the transaction, she continued in possession of the property and to make the payments called for by the contract at the bank where the other copy was kept, for almost two years after the contract was made.

As to the second ground of complaint, plaintiff never tendered performance of the contract, and, until she did, she was in no position to complain of a lien upon the property which did not disturb her possession.

The plaintiff is over eighty years of age and her position appeals to the sympathy of the court, as it probably did to the trial court, but it is our duty to follow the law, and were we to attempt to render judgment to fit the situation we would defeat the very

object sought, by making these contracts of such doubtful security that people in moderate circumstances would be deprived of any opportunity to acquire property on the limited payment plan upon anything except onerous terms which would justify the risk that the seller would be taking.

As this is a suit in equity and the defendant has asked for a judgment for possession of the property, it will be the judgment of this court that plaintiff shall have ninety days after the going down of the remittitur within which to reinstate her contract, and failing this, that the defendant be restored to possession of the property and the contract be cancelled.

Affirmed on plaintiff's appeal. Reversed on defendant's appeal.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16764. Department Two. March 13, 1922.]

ETHEL M. KRAUS, *Appellant,* v. ELIZABETH DOWELL, *Respondent.*[1]

PRINCIPAL AND AGENT (35)—POWERS OF AGENT—AUTHORITY TO COLLECT. A loan agent is shown to be the agent of the borrower, with authority to collect principal as well as interest, of a mortgage in which it was mortgagee, although it did not have possession of the mortgage note, where its practice was to make loans in its own name, indorse them to its customers, collect and remit interest, and the borrower was familiar with the practice, took a note without recording any assignment and had no dealings with the mortgagor, until after the agent had collected part of the principal and become insolvent.

Appeal from a judgment of the superior court for King county, Wright, J., entered June 18, 1921, upon findings in favor of the defendant, dismissing an ac-

[1]Reported in 204 Pac. 795.

tion to foreclose a mortgage, tried to the court. Affirmed.

Benton Embree, for appellant.

James R. Chambers, for respondent.

Hovey, J.—Appellant brought an action for the foreclosure of a mortgage upon property belonging to respondent, for the principal sum of $2,000. Respondent tendered the sum of $1,545, and the trial court entered a decree dismissing the action and cancelling the mortgage. A motion was made to dismiss the appeal because appellant withdrew the sum tendered; but in view of the disposition we propose to make of the case, it is not necessary to pass upon this.

The suit really involves the status of a $500 payment made by respondent to Joseph E. Thomas & Company upon a note and mortgage in their favor as mortgagees. This company was in the loan and real estate business and made a practice of making loans at times with their own money, and at other times with money obtained from clients. The mortgages were always taken in the name of Thomas & Company, and it looked after them even when sold, unless the purchasers required otherwise. Although respondent understood that Thomas & Company would obtain the money from some one else, she never at any time knew who the principal was, but transacted all her business with the company. Thomas & Company obtained the money for this loan from appellant, and indorsed the note to appellant, who thereafter retained it in her possession. The mortgage was placed of record on May 21, 1919. No assignment was ever made of the mortgage until November 18, 1920, when the assignee of Thomas & Company executed an assignment of the mortgage in favor of appellant. On November 19, 1919, respondent

mailed her check to Thomas & Company for the first six months' interest, and she did this again on May 17, 1920, when she paid the second installment of interest, Thomas & Company receipting her each time. These payments were remitted by Thomas & Company to appellant. On June 7, 1920, respondent paid to Thomas & Company $500 on account of the principal of the loan. This money was never paid by Thomas & Company to appellant, but some time prior to July 10, 1920, the company became insolvent, and on that date appellant for the first time communicated with respondent and asked that, in the future, interest be mailed to her, saying, "since Mr. Thomas has failed, we will do business direct with our clients." It is shown by the testimony that, in addition to the loan in question, Thomas & Company had handled four other loans for appellant and her family and she was familiar with their way of doing business.

It is contended by appellant that Thomas & Company was the agent of respondent, from the fact that respondent had their services in securing the loan and paid them a commission, and this may be true, but she further contends that afterwards, in making the interest payments and the payment of principal to the payee in the obligation, this payee continued to be respondent's agent. With this we cannot agree. Respondent was one of the parties to the transaction, and the only other party she knew in the matter was Thomas & Company. On the other hand, we think the evidence clearly shows that Thomas & Company were the agents of appellant, and when she allowed them to make her collections of interest, and while the obligation continued to stand in their names, the respondent was justified in assuming that they had authority to receive payments of principal as well as of interest.

We think that this is so well established that it is not necessary to pass upon the effect of the failure of appellant to secure and file an assignment of the mortgage.

Judgment affirmed.

Parker, C. J., Main, Holcomb, and Mackintosh, JJ., concur.

[No. 16933. Department Two. March 13, 1922.]

J. Ben Price, *Appellant*, v. Royal Insurance Company, Limited, of Liverpool, *Respondent*.[1]

Insurance (188)—Larceny (37)—Action on Theft Policy—Asportation—Question for Jury. In an action on an auto theft policy, the question of asportation is for the jury, where there was evidence from which the jury could find that the car was parked on a grade, with brakes set and the gears locked, preventing propulsion by the engine, and that a third person entered the car, released the brakes and ran it down hill, abandoning it; since theft is not dependent upon the length of time that property is converted or the extent of the use.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 25, 1921, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action on an auto theft insurance policy. Reversed.

Morris & Shipley and *Paul S. Dubuar*, for appellant.

Ogden & Clarke, for respondent.

Hovey, J.—Appellant sued respondent upon an auto theft policy. The case was tried to a jury, which returned a verdict in favor of the appellant. The trial court granted a motion for judgment notwithstanding the verdict and rendered a judgment of dismissal.

[1]Reported in 204 Pac. 803.

The insurance policy was issued by respondent in favor of the appellant and covered a Paige automobile. Appellant had loaned the car to a man named Clark, and the latter had driven it to his home at 1715 East Howell street, in the city of Seattle. Howell street at this point has a grade of five or six per cent to the east until it intersects with Eighteenth avenue. After crossing Eighteenth avenue, the grade increases to about twelve per cent and continues to Nineteenth avenue, where Howell street terminates. The east side of Nineteenth avenue at this point has no street, but there are dwellings facing to the west. Howell street is paved and has a cement curbing bordering the parking strip, and the testimony of Clark and that of his wife and his brother is to the effect that, between 6:30 and 7 p. m., Clark carefully parked the car by turning the front wheels at an angle into the curb, and Clark testifies that he carefully set the hand or emergency brake and locked the transmission. The testimony of several witnesses is to the effect that the brakes were in perfect condition, and a test made of the car after the accident, by elevating the rear wheels and trying out the emergency brake, showed that it was working perfectly. When the gears are thus locked the car can be moved, but the engine, while it can be run, will have no effect upon the movement of the car.

After getting out of the car, Clark and his brother spent a few minutes in looking at the engine, and then went into the house and remained about twenty minutes, when Clark had occasion to go outside to get some milk and discovered that the car was gone. He called to his brother and they could see tracks where the car had been turned from the curb at an angle of about forty-five degrees, to the center of the street, and from there the tracks continued on down the center of the street to Eighteenth avenue, beyond where

there is a different kind of paving, upon which they were unable to trace the tracks. They then found the car where it had collided with a house at the end of Howell street, on the east side of Nineteenth avenue about opposite the center of Howell street. A mechanic who lived next door to the house which had received the car was the first to discover it, and he testified that he found the emergency brake released, the gears locked, the ignition off, and the engine not running. The front part of the car was very badly damaged and the repair bill amounted to $631. There is no dispute as to the extent of the damage or as to the amount of the liability under the policy, in case it is held that the company was liable for the loss.

The landlord of the house at 1735 East Howell street, which adjoins the property in which Clark was living, testified that he saw a man standing by the side of the car looking into the space in the front part where the driver sits, just a few minutes before the car disappeared, and that this man was not either one of the Clarks, but was a stranger to him. This witness was only about thirty feet from the car at the time. Meriam Millman, who also lived at 1735 East Howell street, and who was in her kitchen on the ground floor and only a few feet from the street, saw the Clarks drive up with the car, and some time later heard the car door slam to and saw someone who had just gotten into the car, but could not testify anything concerning the identity of the person getting into the car, nor whether it was a man or a woman. She saw the car then move out into the street and pass her window, in all the distance of possibly one hundred feet, and a few moments later she was advised of the accident. She testified that she could not get a view of the inside of the car as the top was up, and the

house being somewhat higher than the street, she stood in a position slightly above the car.

There was some evidence brought out upon cross-examination that some tracks of a car were found upon the parking strip on the east side of Howell street between Eighteenth and Nineteenth avenues, but they were not connected up with the path of this car, nor with the time covered by the events with which we are concerned. The respondent offered no testimony.

It is the theory of appellant that the car was taken from its standing place for the purpose of being stolen, but after continuing a short distance with it, the thief discovered that he could not operate it because of the gears being locked, and that he thereupon abandoned it.

Respondent contends, in effect, that it is equally plausible that the car simply got away and ran down the hill. But the main proposition advanced by respondent is that, admitting the facts as testified in behalf of the appellant, there is not a sufficient showing of intent to steal the automobile.

Whether there is a theft is not dependent upon the length of time that the property is converted nor the extent of the use to which the thief was able to put it, if possession is actually taken by a wrongdoer and intent to steal can be inferred, even though the possession is but temporary. *Robinson v. State,* 113 Ind. 510, 16 N. E. 184; *State v. Maddaus,* 137 Minn. 249, 163 N. W. 507; *Adams v. State,* 12 Ga. App. 808, 78 S. E. 473. These were criminal actions. In *Kansas City Regal Auto Co. v. Old Colony Ins. Co.,* 187 Mo. App. 514, 174 S. W. 153, recovery was sustained on a policy where the disappearance was not explained in any manner. To the same effect is *Chepakoff v. National Ben Franklin Fire Ins. Co.,* 97 Misc. Rep. 330, 161 N. Y.

Supp. 283. But the cases more nearly applicable to the facts of this case are *Brennon v. Commonwealth,* 169 Ky. 815, 185 S. W. 489; *State v. Davis,* 38 N. J. L. 176; *State v. Maddaus, supra,* in all of which there was an abandonment of the property after it had been taken. In the latter case is the following:

"The point that there was no 'carrying away' or asportation of the car, is based on the idea that defendant and his companion were unable to get farther than they did because of the locked gas feed. They unlocked the ignition with a key they had, and the lock on the chain broke as they started. The car ran a distance of at least 150 feet before it mounted the curb, and the evidence fails to show why it behaved thus. But clearly the car was moved a sufficient distance to constitute larceny."

After examining the testimony, we are satisfied that a sufficient case was made out to justify the jury in finding that the car was stolen. The testimony of all the witnesses is explicit, and except the members of the Clark family, they appear to be wholly disinterested; and while the appellant's case presents an unusual situation, we cannot say that it is an impossible one, and the question of recovery was one for the jury.

It is directed that the judgment appealed from be set aside and that judgment be entered upon the verdict.

Parker, C. J., Main, and Holcomb, JJ., concur.

[No. 16807. Department Two. March 15, 1922.]

Clara Bode, *Respondent*, v. P. W. Rhodes *et al.*, *Respondents*, C. R. Tannehill *et al.*, *Appellants*.[1]

Mortgages (157) — Foreclosure — Limitations — Transfer of Property. As long as the legal title remains in the mortgagor the mortgagee may safely deal with the mortgagor, and subsequent purchasers from the mortgagor who failed to record their deed cannot allege that payments to the mortgagee did not toll the statute of limitations.

Same (106)—Transfer of Part of Premises—Sale in Inverse Order of Alienation. Where portions of mortgaged premises are conveyed by the mortgagor, the foreclosure should provide for sale in the inverse order of alienation; and a purchaser taking title in ignorance of a prior unrecorded deed to another has the superior equity.

Appeal from a judgment of the superior court for Pacific county, Reynolds, J., entered April 11, 1921, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Fred M. Bond, for appellants.

E. S. Snelling and *John T. Welsh*, for respondent.

Hovey, J. — This is an appeal by the grantees of mortgagors from a judgment refusing to sustain their plea of the statute of limitations and ordering the sale of the mortgaged property in parcels in the inverse order of alienation.

Defendants Rhodes and wife mortgaged certain lots in an addition to South Bend, Washington, on January 4, 1912, to the respondent (plaintiff) to secure a note for $600, due in one year after date. The mortgage was properly filed in the office of the auditor of Pacific

[1]Reported in 204 Pac. 802.

county on January 25, 1912, and payments of interest were regularly made each year up to and including January 24, 1920.

Certain of the lots were released from the mortgage on August 22, 1912, and on August 24, 1912, the mortgagors contracted with the appellants C. R. Tannehill and wife for the sale of certain other lots covered by the mortgage. This contract was never recorded. These lots were unimproved and the appellants the following year commenced improvement of the same and placed buildings thereon and have ever since been in possession. Appellants obtained a deed for their lots from the mortgagors and recorded the same on March 18, 1916, but there is no testimony to the effect that the mortgagee ever had any actual knowledge of this deed.

On February 4, 1913, the mortgagors conveyed certain other lots, included in the mortgage, by warranty deed to the respondent Axel Anderson. There is no testimony that Anderson ever had any knowledge of the contract between the mortgagors and the appellants.

Respondent Bode brought suit to foreclose her mortgage on October 11, 1920, naming as defendants the original mortgagors, respondent Anderson, and the appellants Tannehill and wife. In addition to the usual allegations, the complaint sets out the conveyances to the respondent Axel Anderson and the appellants Tannehill and wife. The respondent Anderson did not appear in the action. The appellants answered, and among the allegations of the complaint admitted is the conveyance to Anderson. Appellants alleged affirmatively the delivery to them by the mortgagors of a deed on January 29, 1913, for the property claimed by them, and that the same was not placed of

record until March 18, 1916, and they further alleged that the mortgage against them was barred by the statute of limitations. Upon the trial, the only deed offered in favor of the appellants was that of March 18, 1916, and their previous dealings with the property were represented by the contract dated August 24, 1912.

The trial court entered judgment of foreclosure for the amount called for by the mortgage, and directed that the property belonging to the appellants be first sold and that the property conveyed to the defendant Anderson be secondarily liable.

Appellants contend that the payment of interest by the mortgagors would not keep the mortgage alive or prevent the bar of the statute of limitations from commencing to run from the date that they took their contract. They cite *George v. Butler,* 26 Wash. 456, 67 Pac. 263, 90 Am. St. 756, 57 L. R. A. 396; *Denny v. Palmer,* 26 Wash. 469, 67 Pac. 268, 90 Am. St. 766; *Raymond v. Bales,* 26 Wash. 493, 67 Pac. 269; *Hanna v. Kasson,* 26 Wash. 568, 67 Pac. 271; *Boyer v. Price,* 45 Wash. 667, 88 Pac. 1106.

These are cases where the mortgagors had parted with their title to the property and do not apply to this case. As long as the legal title remains in the mortgagor the relation of mortgagor and mortgagee exists and the mortgagee can safely deal with the original mortgagor. 2 Jones, Mortgages (5th ed.), § 1152; *Krutz v. Gardner,* 25 Wash. 396, 35 Pac. 771; *White v. Krutz,* 37 Wash. 34, 79 Pac. 495.

Upon the second point raised, as the record stands, Anderson took his deed without knowledge of the contract held by appellants, and the appellants did not receive their deed until several years later, which leaves the equities with Anderson. The enforcement

of an execution against several mortgaged parcels of property in the inverse order of alienation has been approved by this court in *Black v. Suydam*, 81 Wash. 279, 142 Pac. 700, Ann. Cas. 1916D 1113, and, with the exception of two or three states, is recognized as the correct rule. 1 Wiltsie, Mortgage Foreclosure (3d ed.), §§ 584-591.

Judgment affirmed.

PARKER, C. J., MITCHELL, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16978. Department Two. March 15, 1922.]

ALEX PALTRO, *Respondent*, v. AETNA CASUALTY & SURETY COMPANY, *Appellant*.[1]

GARNISHMENT (23-26)—PROCEEDINGS TO PROCURE—BOND. Rem. Code, § 680, authorizing writs of garnishment in an action where an original attachment has been issued (in which case the plaintiff must have executed an attachment bond), without requiring any garnishment bond, must be construed as in *pari materia* with the attachment law; and renders the surety on the attachment bond liable for the wrongful issuance of a writ of garnishment in aid of the attachment; otherwise the law would authorize a garnishment without the security of any bond.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 5, 1921, upon findings in favor of the plaintiff, in an action on an attachment bond, tried to the court. Affirmed.

A. B. Comfort, J. Speed Smith, and *Henry Elliott, Jr.*, for appellant.

Boyle & Boyle, for respondent.

PARKER, C. J., The plaintiff, Paltro, seeks recovery of damages suffered by him, which he claims are

[1]Reported in 204 Pac. 1044.

secured by an attachment bond executed by the defendant, Aetna Casualty & Surety Company. Trial upon the merits and submission of the cause to the superior court without the aid of a jury, resulted in findings and judgment in favor of Paltro, from which the surety company has appealed to this court.

There is, we think, no room for serious controversy as to what we deem to be the controlling facts of this case. They may be summarized as follows: In November, 1920, Rudolph Skuija and wife commenced an action in the superior court for King county, seeking recovery of damages in the sum of $1,500 for personal injuries claimed to have been suffered by Mrs. Skuija as the result of an assault made upon her by Paltro. Immediately following the commencement of that action, Skuija applied for a writ of attachment therein, and to that end filed in the case his affidavit, in usual form, alleging as cause for attachment that Paltro "committed an assault and battery upon the plaintiff Anna Skuija by beating and bruising her about the body;" being in substance the same allegation for cause of action made in the complaint in that action. A bond for attachment, in usual form, was thereupon filed in the case, executed by Skuija and wife as principals, and by the surety company as surety. Thereupon a writ of attachment was issued in the case, commanding the sheriff to attach property of Paltro and hold the same to satisfy any judgment that might be recovered against him therein. No real property, nor personal property capable of manual delivery, was levied upon under the writ of attachment; but soon thereafter there was issued in the case a writ of garnishment against the Scandinavian-American Bank, requiring it to answer as to what amount, if any, it was indebted to Paltro; which writ

was applied for by Skuija and wife, and issued, upon the sole ground that an original attachment had been issued in the action, no additional bond being given or required by our garnishment statute, as we shall presently notice. The writ of garnishment was duly served upon the bank. This resulted in the sum of $2,395.99, owing by the bank to Paltro as a deposit, being garnished and held by the bank, so that he was prevented from withdrawing any part thereof pending the action; and by reason of the insolvency of the bank occurring pending the action, he has at all times since then been prevented from withdrawing any portion thereof. The trial in that action upon the merits resulted in a judgment in favor of Paltro, denying to Skuija and wife any recovery, and the dissolution and setting aside of the attachment and garnishment. Thereafter this action was commenced against the surety company, seeking recovery upon the attachment bond in the sum of $2,395.99, claimed as damages resulting to Paltro because of the wrongful issuance of the attachment and garnishment which prevented him from withdrawing any part thereof from the bank. At the conclusion of the trial of this action, the court found, among other things:

"That said attachment was wrongfully, oppressively and maliciously sued out by the said Rudolph Skuija and Anna Skuija, his wife, and with no reasonable or probable cause to believe the grounds on which the same was issued to be true, and that by reason of the suing out of said attachment, this plaintiff has been damaged in the full sum of $2,395.99, which sum the said Rudolph Skuija and wife and the defendant herein have failed, neglected and refused to pay."

We do not find in the record any exception to this finding. In any event, it seems to be well supported

by the evidence. Judgment was rendered in favor of Paltro and against the surety company accordingly; and by consent of Paltro there was embodied in the judgment, as the concluding paragraph thereof, the following:

"It is further ordered, adjudged and decreed, That the defendant, Aetna Casualty and Surety Company, be and it hereby is, subrogated to any and all right, title and interest of the said plaintiff, Alex Paltro, in and to that certain deposit and account of the said Alex Paltro in the Scandinavian-American Bank of Tacoma, which account and deposit is in the sum of $2,395.99."

This was made a part of the judgment, evidently in view of the probability that dividends would at some time be awarded upon the garnished deposit. From this disposition of the cause in the superior court, this appeal is prosecuted by the surety company.

The principal contention here made in behalf of the surety company, and the only one we deem worthy of serious consideration, is that the surety company is not liable upon this attachment bond. The argument is, in substance, that an attachment bond does not secure to a defendant any damages resulting to him from the issuance and service of a writ of garnishment in the same action in which the attachment is issued, though the sole ground for the issuance and service of the writ of garnishment be the previous issuance of a writ of attachment. Our present attachment statute, apart from its garnishment provisions, has remained unchanged, in so far as we are here concerned with its provisions, as enacted by the legislature of 1886 [Rem. Code, § 647 *et seq.* (P. C. § 7379); Laws of 1886, p. 39]. Among the grounds of attachment necessary to be shown by affidavit to be made by or on behalf of the plaintiff is that of

damages "for injuries arising from the commission of some felony." Rem. Code, § 648 (P. C. § 7380), subd. 9. This evidently was the ground relied upon to procure the attachment here in question. Under the attachment statute of 1886, garnishment was effected by service upon a debtor of the defendant of a copy of the writ of attachment, together with an appropriate notice of garnishment. The legislature of 1893 enacted the present garnishment statute, which in effect superseded the garnishment provisions of the attachment statute. Laws of 1893, p. 95; Rem. Code, § 680 *et seq.* (P. C. § 7999). We note certain provisions of this later garnishment statute, referring to the sections of the act of 1893, as follows:

"Section 1. The clerks of the superior courts in the various counties in the state may issue writs of garnishment returnable to their respective courts in the following cases:

"1. Where an original attachment has been issued in accordance with the statutes in relation to attachments.

"2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee. . . .

"Sec. 2. In the case mentioned in subdivision two of the preceding section the plaintiff shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit and pay all damages and costs that may be adjudged against him for wrongfully suing out such garnishment."

Now it is at once apparent that no bond other than the original attachment bond is required to secure the issuance of a writ of garnishment under subd. 1, above quoted, the manifest reason of this part of the statute

being because a bond would necessarily have already been given to procure the writ of attachment, which attachment bond and writ of attachment become the sole foundation of the right to have issued a writ of garnishment in the case, the latter writ being merely supplemental to and in aid of the writ of attachment. If this be not a correct view of the law, then we have the almost unthinkable condition of the law authorizing the issuance of a writ of garnishment for all of the causes enumerated in the attachment statute, without the necessity of giving any bond to secure damage which the defendant in the principal action might suffer by reason of the wrongful suing out of a writ of garnishment, based on an attachment, pending the action. When we view the history of this legislation relating to attachment and garnishment, it is apparent that these two laws must now be read *in pari materia*. As is well said in the text of 36 Cyc. 1147, quoted with approval by Judge Tolman in *State ex rel. American Piano Co. v. Superior Court*, 105 Wash. 676, 178 Pac. 827:

" 'Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time.' "

We are of the opinion that subd. 1, § 1, of the garnishment statute of 1893 (Laws of 1893, p. 95), authorizing garnishment when an original attachment has

been issued, should not be construed apart from our attachment law, but should be construed as in aid of an attachment already issued, and in that sense as a part of our attachment law. It follows that the surety company, when it executed this attachment bond as surety, became liable for all damages which might result to Paltro from the issuance and service of the writ of garnishment here in question, as well as all damages which might result to him from the issuance and service of the original writ of attachment.

The judgment is affirmed.

HOLCOMB, MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16803. Department One. March 15, 1922.]

THE STATE OF WASHINGTON, *on the Relation of The City of Spokane, Appellant,* v. E. V. KUYKENDALL, *as Director of Public Works, et al., Respondents.*

THE STATE OF WASHINGTON, *on the Relation of Spokane Falls Gas Light Company et al., Appellant,* v. E. V. KUYKENDALL, *as Director of Public Works, et al., Respondents.*[1]

GAS (3)—CHARGES—PUBLIC SERVICE COMMISSION. It is the policy of the public service law to permit a public utility to receive a fair and reasonable return upon the reasonable value of its property, and the department has the right to order a departure from a franchise contract, which by Laws 1911, p. 561, § 34, is binding until the department has ordered a departure therefrom.

SAME. Under the Public Service Act, Rem. Code, § 8626-92 [Rem. Comp. Stat., § 10441] the physical value of a gas company's property once fixed, is an established base; and at subsequent hearings, the commission must ascertain the betterments, additions and improve-

[1]Reported in 205 Pac. 3.

ments and reproducing costs; but an allowance of cost price is not prejudicial to a company where it is not shown that there has been any advance in the cost of material used in making the betterments.

SAME. The reasonableness of an expenditure incurred in obtaining new business by a gas company is within the regulatory power of the department of public works, and hence part may be disallowed in considering the value of its property for rate making.

Appeals from orders of the superior court for Thurston county, Wright, J., entered August 22, 1921, dismissing proceedings to review an order of the department of public works establishing gas rates. Affirmed.

J. M. Geraghty and *Alex M. Winston,* for appellant City of Spokane.

Graves, Kizer & Graves, for appellants Spokane Falls Gas Light Company *et al.*

The Attorney General and *Raymond W. Clifford, Assistant,* for respondents.

MITCHELL, J.—Two different gas companies are involved in these proceedings, the Spokane Gas & Fuel Company being engaged in the manufacture of gas, and the Spokane Falls Gas Light Company acting as distributor for the product of the first company. Both companies, however, are under one management, so that the two cases will be considered as though the rights of but one company were involved.

In October, 1920, the company filed with the public service commission a revised schedule of rates providing for an increase of the rates theretofore charged. The public service commission suspended the revised schedule and filed its complaint against the company, charging that the rates proposed were excessive. A hearing was had that resulted in the department of public works, which at that time had succeeded to the powers and functions of the public service commission

(Laws of 1921, p. 20[1]), making an order, upon its written findings, disallowing the proposed schedule of rates filed by the company and putting in effect rates which it found to be just, reasonable and sufficient. The rates thus ordered were greater than those theretofore charged, but less than those the company desired to put into effect as suggested in its proposed schedule.

The city of Spokane, which had participated in the hearing, took the cause into the superior court by writ of review, claiming that no increase of the rates should have been allowed, and seeking a cancellation of the order. At the same time the company, by similar proceedings, complained of the order of the department of public works that it did not grant sufficient increase of rates. The hearing in the superior court resulted in the dismissal of the proceedings and an affirmance of the departmental order. The city and the company have appealed.

Until 1913, the company operated under franchises that had been granted by the city to it or its predecessors prior to the going into effect of the public service commission law. During that period its patrons were charged upon the basis of a flat rate, nearly or quite equal to the maximum allowed by the terms of the franchise ordinance. In 1912, something like a year after the effective date of the public service commission law, the city filed a complaint with the commission against both gas companies, alleging that excessive rates for gas were being charged, and praying that the commission cause a hearing to be had and to make an order reducing the rates. Thereupon the commission made a valuation of the properties of the gas companies, as required by the act of 1911 (Laws

[1]NOTE: See Rem. Comp. Stat., § 10784.

of 1911, p. 601), and caused a hearing to be had upon the question of rates as demanded by the city's petition. The result of that hearing was an order entered in May, 1913, fixing a scale of rates graduated according to the amount of gas consumed, beginning with $1.40 per 1,000 cubic feet for the first 2,000 cubic feet (less than theretofore charged on the flat rate basis), and running to $1.00 per 1,000 cubic feet for all over 15,000 cubic feet used per month.

That schedule of rates continued in effect until June, 1918, when, upon a petition of the gas company filed in 1917 for an increase in the rates, an order was entered by the commission granting an increase. Upon these rates the gas company earned an average of 2.53 per cent per annum, down until the time the commission commenced its investigation which ended in the order here complained of. It was the opinion of the department of public works that the schedule of rates established by the present order would yield a return of 7½ per cent per annum upon the properties of the gas company, according to the values placed thereon by the department, and we understand that neither of the appellants seriously questioned that conclusion.

It is the contention of the city on its appeal "that where a franchise is in existence fixing certain maximum rates the department of public works has authority to order a departure by the utility from the terms of the franchise contract, to the extent of permitting the utility to receive sufficient returns to enable it to give efficient service, to maintain its plant in good condition, and to provide for its operating expenses, taxes and depreciation. In no event could it be permitted to charge higher rates than those which would attain this result and permit a small return upon the

investment." And it is argued, conceding that, in the absence of any existing franchise contract, the rate schedule put into effect by the order of the commission would be just, fair, reasonable and sufficient, yet, as there is a franchise ordinance in existence, the rates authorized by the commission are not just, fair and reasonable.

Preliminarily, it may be observed that it is difficult to perceive why, if it is permissible for the company to make a small return upon its investment in addition to that necessary to enable it to give efficient service, maintain its plant in good condition, and to provide for its operating expenses, taxes and depreciation, it should not be permitted to make a fair and reasonable return upon its investment in addition to those other things mentioned. If any doubt exists as to the latter being the rule, that doubt may be dispelled, for we are satisfied it is the policy of the statute, which is in harmony with guaranteed rights, that the owner shall receive a fair and reasonable return by way of interest or profit upon the reasonable value of his property used and useful in the public service. By the act of 1911 (Laws of 1911, p. 561, § 34) the terms of a franchise contract like the one in question here are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 172 Pac. 899. In the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287, it was decided that the public service commission law placed the entire subject of rate regulation under the control of the commission, that no contract

between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case.

Counsel for the city calls attention to § 34 of the act of 1911, Rem. Code, § 8626-34 [Remington's Compiled Statutes, § 10370], which says that a gas company, among others, shall not be prevented from continuing to furnish its product under any contract in force at the date the act takes effect, or upon the taking effect of any schedule of rates subsequently filed with the commission as provided by the law, at the rates fixed in such contract, provided that the commission shall have power, in its discretion, to direct by order that the contract shall be terminated by the company, and thereupon such contract shall be terminated by such company as and when directed by the order. Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein

the words "and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated," or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material.

On the contrary, the company, by its appeal, insists that the rates fixed by the departmental order are inadequate and insufficient. The gist of the controversy arises because of divergent views as to the manner of ascertaining the rate base. In the hearing before the department, counsel for the company offered to prove, and insisted they were entitled to show, the reproduction cost new of the present plant of the company, less depreciation upon the depreciable items, and to have a fair return upon that basis. That is to say, they proposed to show that there has been a change in conditions since the 1913 valuation, in that the cost of all commodities has so increased that, if the plant was to be built new at this time, it would cost a great deal more than in 1913, and having proven that and then deducted the depreciation for the long time the property has been in use, the basis would thus be established upon which the rates should be based.

The department rejected the offer and declared, as subsequently stated in its written findings, opinion and order, in effect, that it is contemplated by the law of this state that, when a valuation for rate making purposes has been once made, such valuation shall stand except as modified by plant additions or deductions, as the case may be, unless it later appears that palpable error was committed in making the original valuation; that it has been the policy of the department to permit public utilities to base earnings upon their investment in property used and useful in the public service; that if the investment was improvident or the

management during construction inefficient, so that the original cost was more than it should have been, a value has been fixed for rate-making purposes at a sum which would represent as nearly as possible a prudent investment (which investment does not change); that additions and betterments are accounted for at subsequent hearings at their cost to the utility; that if plant units were actually and necessarily purchased and made at war prices, such cost is added to and becomes a part of the rate base; and that it could not adopt a theory which will require the department to inflate or deflate a rate base in harmony with fluctuating prices.

There is abundance of authority sustaining the view expressed by the appellants in their brief in a quotation from the syllabus in the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, as follows:

"For the purpose of fixing rates, the value of property employed should be determined as of the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value since acquisition."

This theory has been repeated in recent decisions of the United States district courts with some emphasis because of conditions growing out of the world war. *Joplin & P. R. Co. v. Public Service Commission*, 267 Fed. 584; *Consolidated Gas Co. of New York v. Newton*, 267 Fed. 231; *St. Joseph R. Light, Heat & Power Co. v. Public Service Commission*, 268 Fed. 267. As we understand from a reading of those cases, the rate-making bodies were in no way circumscribed or directed by any governing legislative act prescribing the course to be pursued in ascertaining from time to time, after the original or primary valuation, the present value of the property as a base upon which the rates should be fixed.

In this respect the department of public works of this state is not without statutory direction. In the public service commission act of 1911, § 92 (Laws of 1911, p. 601), Rem. Code, § 8626-92 (P. C. § 5619), it is provided, upon the subject of procedure for the valuation of property, as follows:

"The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

"It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company. . . .

"It shall also ascertain the total market value of the property of each public service company operating in this state, used for the public convenience within the state.

"It shall also ascertain the time intervening between the expenditure of money in the cost of construction and the time when returns in the shape of dividends were first received by each of these companies.

"It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, . . .

"It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase or diminish. . . .

"It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future, and whether the money expended by such company has been reasonable

for the present needs of the company, and for such needs as may reasonably be expected in the immediate future."

Manifestly the legislature had before it in the enactment of this law the leading and exhaustive opinion in the case of *Smyth v. Ames,* 169 U. S. 466, 42 L. Ed. 819, wherein many of the same elements going to make up a rate base are suggested. This same section of the act of 1911 then provides that the commission shall make and enter findings of fact in writing, upon all matters concerning which evidence may have been introduced before it, that shall tend to show the value of the property used by such company for public convenience. The requirements of this law were complied with by the commission as to the properties of the appellant gas company in the year 1913, as has been already mentioned herein. Then for the purpose of all future or subsequent valuations, this same section of the law, in the same mandatory way, provides:

"The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business respectively, and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall

be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: *Provided,* That such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing." Laws of 1911, p. 604; Rem. Code, § 8626-92. [Rem. Comp. Stat., § 10441.]

That is to say, concerning the physical property of the company, the commission is directed to ascertain at each subsequent hearing upon rate controversies, the betterments, improvements, additions and extensions made by the public service company since the date of the then last preceding hearing and the cost of reproducing such betterments, improvements, additions and extensions that would change or affect the findings previously made, and supplement those formerly made by such additional findings. Now, in the present case, it cannot be claimed, nor indeed is it claimed, that the allowance by the department of cost price rather than reproduction cost of all betterments made by the appellant since the last appraisal of its property in 1918 was unfavorable to the appellant, since it is not shown there has been any advance during that time in the cost of material used in making the betterments.

This statutory plan of fixing valuations is the one that was employed by the department of public works in arriving at the rate base complained of and which justified the rejection of proof offered by the appellant. Thus it is a fact that the amount fixed by the department is the present value of the properties upon which the rates must be based, as mentioned in the

authorities. The amount may be different from what it would have been had the department followed the course insisted upon by the appellant but it is the only amount that could be fixed by pursuing the course prescribed in the statutes.

Appellant further objects to the disallowance of a portion of the expense it claimed to have incurred in obtaining new business. The amount involved is small and of comparatively little importance. The principle involved, however, is an important one. The contention of the company is that the commission is without power to thus interfere with the legitimate management of the plant of a public utility company. We have no doubt, however, that, since such expenditure is referred to expense account and must therefore be taken into consideration in fixing the rates, it properly falls within the regulatory powers of the department, so that the inquiry is into the reasonableness of the action of the department with reference to it. Upon examination of the record for that purpose, we are not disposed to disturb the finding and conclusion of the department.

The judgments of the superior court are in all respects affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16476. Department One. March 15, 1922.]

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*, v. McGOLDRICK LUMBER COMPANY, *Respondent*.[1]

CARRIERS (5)—REGULATION AND CONTROL—DEMURRAGE CHARGES—DELIVERY OF CARS. A railroad company did not make legal delivery of cars, and could not recover demurrage charges where, owing to unprecedented floods, cars of logs consigned to defendant, could not be placed at the usual unloading place or near the plant or unloading spur so that they could be unloaded.

SAME. There was no delivery of cars of logs, to start demurrage charges, where owing to unprecedented floods, the railroad company was unable to move the cars to a position where they could be unloaded, according to the usual custom.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 1, 1919, upon findings in favor of the defendant, dismissing an action by a carrier to recover demurrage charges, tried to the court. Affirmed.

A. C. Spencer and *Hamblen & Gilbert*, for appellant.
White & Randall, for respondent.

BRIDGES, J.—By this action the plaintiff seeks to recover of the defendant $2,395, as demurrage.

The defendant owns and operates a large sawmill plant located on or near the Spokane river, where it flows through the city of Spokane. The plaintiff is a common carrier railroad. One of its main lines enters Spokane, and it has various spur or side tracks located on the land forming the site of the defendant's mill plant. One of these spur or side tracks leads to or alongside the bank of the river. Cars loaded with

[1]Reported in 204 Pac. 1059.

logs consigned to the defendant are placed on this spur track and are dumped into the defendant's mill pond or boom located within a portion of the waters of the river. Prior to the occurrences hereinafter mentioned, the defendant had executed and delivered to the plaintiff an agreement which is called a "Pacific Northwest Demurrage Bureau Average Agreement." This agreement, among other things, provided for a certain number of hours free time within which cars delivered to the defendant might be unloaded without any charge for demurrage, but thereafter certain demurrages were to result.

On May 13, 1917, the plaintiff delivered on the unloading spur track certain cars loaded with saw logs. On that date a large freshet was running in the Spokane river, and during that day it became so great that the banks of the river were overflowed, and from that time on until sometime in the following month the river was unprecedentedly high and most of the defendant's mill premises were under water, and the unloading spur was for the most part covered by from two to five feet of water. On days subsequent to the 13th of May, and while the river was still in freshet, the plaintiff brought into Spokane other cars loaded with saw logs, consigned to the defendant. Because of the high water conditions it was unable to put these cars on the unloading spur or within the yard of the defendant, consequently they were all left at places outside of the defendant's premises, and at points where they could not be unloaded. During all of this period there were eight loaded cars on the unloading spur, and some twenty-two loaded cars which had been left at places outside of the defendant's mill premises. It is on these thirty cars that the plaintiff seeks demurrage. There was a judgment dismissing the action, and the plaintiff has appealed.

Appellant takes the position here that the respondent failed to unload within the free time the thirty cars loaded with logs, because of the unprecedented freshet we have described, but contends that, under the average demurrage agreement to which we have called attention, the respondent would not be excused from demurrage on the ground that because of the high waters it was impossible for it to unload the cars within the free time. The view we take of this case makes it unnecessary for us to follow the appellant into the intricacies of the average demurrage agreement and the demurrage rules. We may assume, but not decide, that appellant's position is correct, yet we think it was not entitled to recover because of its failure to make any legal delivery of the logs in question. Previous to the time in question, it had been the custom for all logs consigned to the respondent, and carried by the appellant, to be delivered on the unloading spur. That was the only place for delivery of the logs for unloading. The appellant, because of the unprecedented flood conditions, was unable to deliver twenty-two cars of the logs in question at the usual unloading place, and it would seem that as to those cars there had been no delivery, and consequently there could be no demurrage. Those cars were left at distances running from one-fourth of a mile to a mile or more away from the respondent's plant and its unloading spur.

While the situation with reference to the other eight cars is quite different from that concerning the twenty-two cars just mentioned, yet we are of the opinion that there was no delivery of those cars so as to start the running of demurrage. As we have already said, those eight cars were placed on the unloading spur before, but on the day, the river began to overflow its banks.

It satisfactorily appears that, before cars could be unloaded, it was necessary that they be placed in certain positions on the spur. This placing was always done, whenever requested, by appellant's switch engines. Such was the custom. It further appears that these eight cars on the spur were in such position as that they could not be unloaded into the boom without the appellant's switch engine moving them. The respondent requested appellant's servants to so move these cars, but they were unable to do so because of the extreme high waters and the resultant dangerous condition of the tracks. Under these facts, it seems clear to us that there was not such a delivery of these eight cars as to start the running of demurrage. We therefore hold that, whatever might have been appellant's rights under its contract had these cars been delivered in position to be unloaded, it cannot recover any demurrage because none of the cars was so delivered. Judgment affirmed.

Parker, C. J., Fullerton, Mitchell, and Tolman, JJ., concur.

[No. 16976. Department Two. March 15, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. O. S. LARSON, *Appellant*.[1]

BANKS AND BANKING (4-1)—OFFENSES—UNLAWFUL LOANS—INFORMATION. Under Rem. Comp. Stat., § 3259, making it a felony to loan bank funds to an officer of the bank without procuring authority by a resolution of the directors, an information charging a consummated loan is sufficient, notwithstanding it charges that the resolution was not *first* procured; since a subsequent approval would be no defense.

BANKS AND BANKING (4-1)—CRIMINAL LAW (110)—EVIDENCE OF OTHER CRIMES. The offense of loaning the funds of a bank to an officer without procuring the necessary authority involves no element of intent or motive; hence it is error to admit evidence of other like offenses or of a custom to pursue that method.

CRIMINAL LAW (229)—TRIAL—SCOPE OF EVIDENCE IN REBUTTAL. In a prosecution for unlawfully loaning the funds of a bank, evidence of other like offenses is not admissible in rebuttal, because of defendant's statements on cross-examination as to defendant's request to another officer to have the loan attended to in the regular way.

BANKS AND BANKING (4-1)—CRIMINAL LAW (458)—SENTENCE—EXTENT OF PUNISHMENT. Under Rem. Comp. Stat, § 3259, making it a felony to loan bank funds to an officer of the bank without a resolution of the directors, the court can only sentence defendant to the penitentiary, and not for a misdemeanor.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered June 14, 1921, upon a trial and conviction of a violation of the banking laws. Reversed.

Tucker & Hyland and *Hayden, Langhorne & Metzger*, for appellant.

J. W. Selden and *J. A. Sorley*, for respondent.

HOLCOMB, J.—Appellant was indicted, tried, convicted and sentenced for an alleged violation of the

[1]Reported in 204 Pac. 1041.

banking laws, being based on § 52, ch. 80, Laws of 1917, p. 297. That section is as follows:

"No bank or trust company shall, nor shall any officer or employee thereof on behalf of such corporation, directly or indirectly, loan any sum of money to any director, officer or employee of such corporation, unless a resolution authorizing the same and approved by a majority of the directors, at a meeting at which no director, officer or employee to whom the loan is to be made shall be present, shall be entered in the corporate minutes.

"Every director and officer of any bank or trust company who shall borrow or shall knowingly permit any of its directors, officers or employees to borrow, any of its funds in an excessive amount or in violation of the provisions of this section, shall be personally liable for any loss or damage which the corporation, its shareholders or any person may sustain in consequence thereof, and shall also be guilty of a felony." [Rem. Comp. Stat., § 3259.]

The indictment charged the defendant with the crime of loaning the money of a state banking corporation to an officer of such corporation without authority by resolution of the board of directors of the bank authorizing the same, and approved by a majority of the directors, having been first entered in the corporate minutes, and described the offense as follows:

"That the said O. S. Larson in the county of Pierce, state of Washington, on or about the 25th day of September, 1920, then and there being an officer of the Scandinavian-American Bank of Tacoma, a banking corporation duly organized and existing under and by virtue of the laws of the state of Washington, did then and there on behalf of such corporation, unlawfully and feloniously loan to himself the sum of ten thousand ($10,000) dollars, the money and property of such banking corporation, without a resolution authorizing the same and approved by a majority of the directors at a meeting at which the said defendant was not pres-

ent, having been first entered in the corporate minutes, contrary to the form of the statute," etc.

To this indictment appellant interposed a demurrer upon the grounds that it did not substantially conform to the requirements of the criminal code of the state, and that the facts as charged in the indictment did not constitute a crime.

The first error claimed is in overruling the demurrer to the indictment.

It is argued that the indictment signally fails to charge appellant with any offense. It is insisted that the indictment alleging that the loan was made by appellant to himself without the resolution required by the statute having been *first* entered in the corporate minutes alleges an element not found in the statute, namely, the making of the loan prior to the entry of the resolution authorizing the same having been first entered in the corporate minutes. It is urged that the indictment does not charge that a resolution was not passed authorizing the loan, but only that the loan was made prior to the entry in the minutes of the resolution authorizing the same.

It is true that the statute upon which the prosecution is based does not use the word "first" in creating the offense; and it is true that the penal statutes are to be construed strictly, to the end that offenses not entitled to be included shall not be prosecuted. But it is not true that they are to be construed so strictly that they would be defeated by a forced and over-strict construction. *United States v. Morris,* 14 Peters (U. S.) 464, 10 L. Ed. 543; *United States v. Wiltberger,* 5 Wheat. (U. S.) 76, 5 L. Ed. 37; *State v. Stewart,* 52 Wash. 61, 100 Pac. 153.

There is no uncertainty in the language of this statute, and fairly construed, it simply means that, when

an officer or employee of a bank or trust company desires to obtain a loan from that bank or trust company, he shall not make it to himself, but he must procure a resolution authorizing the same, and approval by a majority of the directors at a meeting at which the officer, director or employee to whom the loan is to be made shall not be present, and the resolution authorizing the same shall be entered on the corporate minutes. The obvious effect of this language is that, before the borrowing is consummated, there must be such a resolution, and it must have been passed as required by the statute. The loan referred to in the indictment, as shown by the evidence, was upon a note for the sum of ten thousand dollars, payable to the Scandinavian-American Bank of Tacoma. The note, of course, was only the evidence of the indebtedness, and the loan from the bank to appellant was the money passed to his credit or withdrawn from the coffers of the bank. He, being an officer, as described, of the banking corporation and borrowing the ten thousand dollars, had not consummated the borrowing, or the offense charged, until the money had been passed to his credit or withdrawn from the bank, and, before that consummation, the resolution authorizing the same was necessary under the statute. The indictment was therefore sufficient under the statute, and the demurrer was properly overruled.

Another error claimed by appellant, and intimately connected with the one just discussed, is in the refusal of the court to admit testimony that, on December 10, 1920, the board of directors of the Scandinavian-American Bank approved the loan of September 25, 1920, made by appellant.

Under the statute, if that were done, it could not wipe out the offense. The offense was consummated

by appellant when the ten thousand dollars borrowed, if it was unauthorized as required by statute, was passed to his credit or withdrawn from the bank. One of the evident purposes of the statute was to prevent just such proceedings as might have been adopted as offered to be shown by appellant.

The only other errors urged by appellant which are of any significance, and which we shall discuss, are these: In admitting testimony that appellant had, at other times previous to September 25, 1920, borrowed money from the Scandinavian-American Bank of Tacoma without a resolution of the board of directors authorizing the loan or loans; and in overruling objections of counsel for appellant to the line of testimony indicated in the foregoing assignment, based upon the ground that it was not proper cross-examination of appellant as a witness in his own behalf.

In order to discuss these errors a brief resume of the facts as developed at the trial is necessary.

During the year 1920, appellant was the president and one of the directors of the Scandinavian-American Bank of Tacoma, a banking corporation existing under the laws of Washington. In September, 1920, it became necessary for appellant, in the interest of the bank of which he was president, to make a trip to Philadelphia and other eastern points. On the afternoon of September 24, 1920, appellant signed a note for ten thousand dollars, payable to the Scandinavian-American Bank, and left the note, as he testifies, with Charles Drury, who was then chairman of the board of directors of the bank, with instructions to have the necessary resolution passed by the board and the proceeds of the note passed to his credit. Drury denied that the note was left with him, or that appellant gave him any instructions concerning the same. On the

same day, appellant purchased a ticket over the Chicago, Milwaukee & St. Paul Railway to Philadelphia, to start the succeeding day. About 3 o'clock in the afternoon he left Tacoma for Seattle, went to his home in Seattle, spent the night there, and between 8 and 9 o'clock on the morning of September 25, left for Philadelphia. On September 25, 1920, a note teller in the bank entered the note signed by appellant for ten thousand dollars on the books of the bank, making the proper bookkeeping entries, and credited appellant's account with the proceeds. This teller was a witness at the trial, but could not testify who gave him the note, or who instructed him to make the entries on the books of the bank. He did not believe that Mr. Drury gave him the note. Appellant testified that, on September 24, 1920, he signed a note for ten thousand dollars, payable to the Scandinavian-American Bank of Tacoma, and left the same with Mr. Drury, with instructions to have a proper resolution passed by the board of directors of the bank approving the loan; that he thereupon went to the ticket office of the railway company, purchased a ticket to Philadelphia good for passage on the following day; that he left for Philadelphia the following day between 8 and 9 o'clock in the forenoon, and went directly there; that he was on important business for the bank; that he transacted the business and returned home, and had no knowledge that the resolution approving the loan had not been passed until December 10, 1920.

On cross-examination, over repeated objections of counsel for appellant, the trial court permitted counsel for the state to interrogate appellant concerning other loans he had made from the Scandinavian-American Bank previous to September 25, 1920, in which instances there were no resolutions of the board of directors of the bank authorizing the previous loans,

and whether it was his "habit" or custom to pursue that method.

The trial court required appellant to so testify on cross-examination on the principle, as stated by the court, that it might tend to show the system of appellant in making or procuring loans from the bank; and respondent contends that this proposition is correct. Respondent further contends that the cross-examination was proper because the matter was opened up by voluntary statements of appellant.

We do not consider the statements alluded to by the prosecution as voluntary statements. Appellant had testified as to his instructions to Drury, as chairman of the board of directors, to get the proper resolution passed and place the proceeds of the note to appellant's credit. By a proper resolution evidently was meant the resolution required by the statute. Prior to 1917, when this statute was enacted, no resolution was required. Appellant had been an officer of the bank referred to both before and after the enactment of the statute, continuously. What respondent refers to as voluntary statements of the witness occurred as follows on cross-examination:

"Q. Have you told us all you told Mr. Drury? A. Yes. Q. What did you mean, Mr. Larson, by having this note attended to in the regular way when you told Mr. Drury to take care of it in the regular way? A. Why I meant to have it put up to the majority of the board, and the proper entry made on the minutes."

Now, such answer, of course, referred to the requirements of the statute as to the passing of a resolution and entering it upon the minutes, but had nothing to do with the custom of appellant or the bank, or anyone else. The offense denounced by the statute involves no elements of intent, or *scienter*. The mak-

ing of any such loan, directly or indirectly, to any director, officer, etc., without a resolution authorizing the same, and approved by the majority of the directors at a meeting at which such director, officer or employee to whom the loan was to be made shall not be present, and which resolution shall be entered in the corporate minutes, is the offense.

It is true, and respondent cites many of our own cases and cases from other jurisdictions to the effect that in offenses involving intent, or fraud, or motive, other offenses of like character may be shown in order to prove intent. But the converse is equally true, that where intent or motive is not of the essence of the offense, other offenses of like character cannot be shown, with some well known exceptions. In *State v. Bokien,* 14 Wash. 403, 44 Pac. 889, a case which has been many times approved and reaffirmed by us, which was a prosecution for obtaining goods under false pretenses by the giving of a check upon a bank in which the defendant had no funds, it was held error to allow the prosecution to introduce evidence of other checks having been given by the defendant to other persons when he had no funds on deposit. In discussing that proposition, the court said:

"The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case, and the previous transactions of the defendant, which were permitted to be shown, no more formed a part of a single scheme than the several larcenies of a thief; and it certainly would not be com-

petent in order to show that one had stolen certain property to prove that he committed larceny at a previous time."

Respondent admits that it could not have introduced independent evidence in chief to the effect that appellant had, on other occasions than the one mentioned in the indictment, made loans from the bank, of which he was an officer, without the authorizing resolution; but respondent attempts to justify the wringing of this testimony from appellant on cross-examination, as heretofore stated, and further, that it became an issue because appellant had attempted to justify himself by testifying that he had left the matter with Drury, with instructions to procure the required statutory resolution and then have the proceeds passed to his credit. It was utterly immaterial to this prosecution whether appellant had made previous loans from the bank, or, if so, the course of procedure followed in making the same. The sole question to be determined in this case was whether or not he had obtained the loan here involved, directly or indirectly, in a manner forbidden by statute. No system or scheme of his or of the bank was relevant or proper to show whether he did or did not commit the offense charged. Nevertheless, the compulsion of such testimony from appellant on the part of the state must necessarily have been prejudicial, and in this case he defended upon the ground that he attempted to and supposed that the requirements of the statute would be complied with through the chairman of the board of directors, and under the statute he could not be present at the meeting at which it should be authorized. The borrowing could not legally be consummated until that authorizing resolution had been passed and entered on the minutes. But any other borrowing at any time, and any method

or system that he or the bank adopted, was purely collateral, and in such a prosecution as this, irrelevant and incompetent. We analyzed the cases where other offenses might be shown in prosecutions in *State v. Smith,* 103 Wash. 267, 174 Pac. 9, where we said:

"To establish guilty intent, unlawful motive, or criminal knowledge, it is permissible to show that the act charged against the defendant was one in a series of similar ones; but beyond this, the state cannot go and, for the purpose of securing a conviction, show the perpetration of other similar acts, even though committed in furtherance of a general scheme, where there is no proof required to establish intent, motive or knowledge, other than proof of the act charged itself. In other words, where the act charged against the defendant itself characterizes the offense, the guilty intent is proven by proving the act."

See the cases cited in the above decision upon this question. We are therefore firmly convinced that the cross-examination was improper and highly prejudicial to appellant. While there was ample evidence, if the jury disbelieved appellant as to the manner in which this loan was made, and believed the testimony of the other witnesses for the state, including that of Drury, the chairman of the board of directors, upon which to convict under this statute of the offense charged, yet accused persons are entitled to be tried according to the forms of law, and not to have their constitutional rights invaded. We are unable to say what the jury would have done had this prejudicial testimony as to other loans not been before it. It might have believed either one as between Drury and appellant. At any rate, the constitutional rights of appellant were plainly invaded and he was compelled to give evidence tending to incriminate him.

Another error claimed by appellant is in the sentence of the court to serve a term in the state peni-

tentiary, appellant contending that he could not be sentenced for anything more than a misdemeanor.

We are unable to find any basis for this contention whatever. The statute creating the crime makes it a felony, and other statutes provide penalties in such cases.

For the errors as to improper cross-examination of appellant, the judgment must be and is reversed, and the cause remanded for a new trial.

PARKER, C. J., BRIDGES, HOVEY, and MAIN, JJ., concur.

[No. 16838. Department Two. March 15, 1922.]

PIONEER LUMBER COMPANY, *Appellant*, v. PHIL GEVURTZ, *Doing Business as Gevurts Lumber Company, Defendant*, THE BANK OF CALIFORNIA, *Respondent*.[1]

GARNISHMENT (58)—PROPERTY PLEDGED. Proceeds of a draft, secured by a pledge of the documents to one who loaned money to the drawer, cannot be garnished as the property of the drawer.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 29, 1921, in favor of the defendant, in garnishment proceedings, tried to the court. Affirmed.

Alexander, Bundy & Swale, for appellant.

Kerr, McCord & Ivey, for respondent.

MACKINTOSH, J.—The controversy before us arises over a writ of garnishment issued against the respondent, which had in its possession $976.18, the proceeds of drafts drawn by the defendant upon the appellant. The appellant paid these drafts and then had the pro-

[1]Reported in 204 Pac. 774.

ceeds garnished to satisfy a judgment which it had obtained against the defendant. The only issue is whether this money belonged to the defendant or to his wife. The trial court held that it belonged to the latter, and discharged the respondent.

The defendant was a lumber broker in Vancouver, B. C., and the appellant, which is engaged in the lumber business in Seattle, purchased from the defendant cars of lumber which the defendant had bought from mills in British Columbia. The defendant drew drafts on the appellant for the purchase price of these shipments, the drafts being made payable to a bank in Vancouver, the invoices and bills of lading being attached to the draft. These were then forwarded by the Vancouver bank to the respondent bank in Seattle, which presented the same to the appellant, who paid them.

The only testimony in the case as to the ownership of the proceeds of these drafts comes from Mrs. Gevurtz, whose testimony was taken by deposition, and is to the effect that she purchased the drafts from her husband, having paid for them by advancing the money necessary to be paid to the mills from which the lumber was purchased, with the addition of certain funds which she had given him to be used in another branch of his business.

It is the claim of the appellant that this transaction between Mrs. Gevurtz and her husband did not amount to a sale by him and a purchase by her of the documents, but was only a loan by her to him. This is a disputed fact, of course, and our examination of the testimony leads us to the same conclusion as that reached by the trial court, to wit, that Mrs. Gevurtz became the owner of the documents and was entitled to their proceeds.

Being satisfied that this is the result to be arrived at, it is unnecessary to enter upon a discussion of another phase of the case which would lead to the same end. Under *Vickers v. Machinery Warehouse etc. Co.*, 111 Wash. 576, 191 Pac. 869, and *National Bank of the Republic v. Hines*, 112 Wash. 352, 192 Pac. 899, even if we should have found as a fact that the transaction amounted to a loan, yet it was secured by a pledge of the documents, which fact would affirm the judgment. The judgment of the lower court is sustained.

PARKER, C. J., HOLCOMB, HOVEY, and MAIN, JJ., concur.

[No. 16887. Department Two. March 15, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED GOODWIN *(Alias John Fred Welch)*, *Appellant*.[1]

CRIMINAL LAW (104)—EVIDENCE—RES GESTAE—STATEMENTS OF PERSON INJURED. Upon a prosecution for murder by blowing up a dredge, statements of an injured workman made within 10 or 15 minutes after the explosion, when rescued from the water, are admissible as part of the *res gestae*, where they were spontaneously made and presumptively impulsive and without design or premeditation.

SAME (104). In such a case, statements made while the injured man was being rowed across the river, and which were mere repetitions of his first statements, are admissible as part of the *res gestae*.

SAME (131-1)—EVIDENCE—ADMISSIONS OF ACCUSED—ACQUIESCENCE OR SILENCE. In a prosecution for murder by blowing up a dredge, statements of deceased shortly after the explosion charging defendant with the crime, made in defendant's presence, and not replied to when the circumstances naturally called for a reply, are admissible.

[1]Reported in 204 Pac. 769.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered March 29, 1921, upon a trial and conviction of murder. Affirmed.

W. H. Abel and *D. G. Abel,* for appellant.

Herman Murray, for respondent.

MACKINTOSH, J.—At nine o'clock on the night of December 16, 1920, there were five employees on a dredge anchored in a river in Pacific county. An explosion occurred on the dredge in which three were instantly killed, the fourth died before midnight, and the fifth, the sole survivor, is the defendant in this case, charged with having murdered his companions. He was convicted and this is his appeal.

The noise of the explosion and the light from the fire which followed it attracted the attention of the few persons residing in the vicinity, who, by foot paths and in rowboats, hurried to the scene. The outcries of Eigel Christianson, who was struggling in the water, brought assistance to him. He was taken out of the water at a point about three hundred feet from the dredge, in a terribly mutilated condition, and placed in a rowboat. His rescue occurred some ten or fifteen minutes after the explosion. As he was being pulled into the boat, witnesses testified that he said, "That crazy son of a bitch," and continued to repeat that remark. He was rowed from the point where he was picked up to near the dredge, where the defendant was standing. He there said, "He even clubbed me after I got into the water." An attempt was made to carry him to the shore near the dredge, but his pain was so intense he was allowed to remain in the boat, and was rowed to the opposite side of the river, a distance of some two hundred feet. While on his way across the river, witnesses testified that he inquired where

they were taking him and why. From there he was taken up the river some three hundred yards to a fisherman's shack, and on the way up he repeated the expression, "He even clubbed me after I was in the water."

At the shack he was placed on a cot and first aid given him. The defendant was brought to the same shack a few minutes later (all this occurring within half an hour after the explosion), and was placed on a cot in the same room and on the opposite side of a stove. "Their heads were laying towards the stove; I think perhaps they were lying two feet from the stove, each one of them. They could see each other." While lying in this position, witnesses testified that Christianson said, "He did it." "Mr. Behnke, Mr. Jarvi and I were playing cards, he came in with three sticks of dynamite and then jumped overboard." "When I was trying to get up the bank he struck me three times over the head with a club." "He did it." "That man hit me three times over the head with a stick." He inquired who was lying on the other cot, and when they told him, he said, "Come over here, Pete," and pointing to Welch said, "There is the man that done it."

It is claimed by the appellant that all of these statements were improperly admitted, not being part of the *res gestae.*

It will be noticed that this testimony may be divided into three groups: first, those statements which were testified as having been made by Christianson before he was taken to and at the dredge; second, those made while being rowed up the river; and third, those made while in the fisherman's shack.

The rule as to the admissibility of statements as part of the *res gestae* has been greatly relaxed since

the early days of the common law, and it is no longer necessary, in order to render these statements admissible, that they be made contemporaneously with the incident to which they relate. Modern authorities recognize this relaxation, and it may be said safely that the rule now is as stated in the recent case of *Solice v. State*, 21 Ariz. 592, 193 Pac. 19, where the supreme court of Arizona used the following language:

"Were the statements a part of the *res gestae*? We have examined a large number of authorities upon the abstract propositions involved in the rules on which testimony is received or not received as part of the *res gestae*. These authorities satisfy us that the close connection in time between the statements or declaration and the act of which it is said to be a part is an element for consideration; that being close in point of time is not, however, all of the basis for receiving such evidence, and that the ultimate test is spontaneity or instinctiveness and logical relation to the main event; that the tendency of the modern cases is to be liberal in the reception of such testimony.

"Mr. Wigmore, under the convenient term of 'Spontaneous Exclamations', discussing the exceptions to the general rule excluding hearsay evidence, in his work on Evidence, at Section 1750, volume 3, page 2256, says:

" 'It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway, and to be dissipated. The fallacy formerly entertained by a few courts, that the utterance must be strictly contemporaneous (post, § 1756), owes its origin to a mistaken application of the verbal act doctrine. . . . Furthermore, there can be no definite and fixed limit of time. Each case must depend upon its own circumstances. . . . Since the application of the principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of

precedents. To argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle, and to cumber the records with unnecessary and unprofitable quibbles.' "

It is plain that the statements made by Christianson within the short time which elapsed between the explosion and the time he was taken across the river, in view of the testimony as to the considerable injuries which he had suffered, were statements which were spontaneously and instinctively made and raise a reasonable presumption that they were impulsive utterances of thoughts arising from the circumstances, and made so soon thereafter as to negative any presumption that they were made with design and premeditation. This court has recognized the admissibility of such statements in the recent case of *Heg v. Mullen,* 115 Wash. 252, 197 Pac. 51.

The statements made by Christianson while being rowed to the fisherman's shack would seem, also, to be admissible as part of the *res gestae,* under the rule which has been stated above, it being clear that they were made while under the shock and excitement of the explosion, and we see no reason for refusing their admission in the fact which appellant relies on that Christianson, when being rowed across the river, inquired as to his whereabouts and the reason for his being moved. A man does not have to be irrational and oblivious of his surroundings in order to allow in evidence his statements as part of the *res gestae.* Furthermore, the statements that were made by Christianson on the way to the shack were only a repetition of what he had already said, and if it might be argued that they were not strictly part of the *res gestae,* still their erroneous admission could not be held to have been prejudicial.

The statements made by Christianson at the shack are admissible on another well recognized rule of evidence, which is to the effect that statements made by a victim in the hearing of the defendant, relating to the matter at issue, which would naturally call for reply, if the defendant did not desire to acquiesce in them, are admissible. The authorities sustaining this rule are counted by the score and it is hardly necessary to cite more than the opinion of this court in *State v. Baruth,* 47 Wash. 283, 91 Pac. 977, where it is said:

"Counsel for the state contend broadly that any statement or declaration of the person injured made to a third person, in the presence or hearing of the accused, either charging him directly with the crime or pertaining to matters otherwise relevant to the issue, if not denied by the accused, may be given in evidence against him as an admission on his part. On the other hand, the appellant contends that the mere presence or hearing of the accused is not alone sufficient to render the evidence admissible, but the statements must relate to the matter at issue, must be addressed to the accused, or made under such circumstances as would ordinarily and naturally call for some action or reply from persons similarly situated; and that, if the condition be one of doubt as to whether a reply should or should not have been made, the evidence should not be received. There are cases which support the respondent's contention, many of which are collated in its brief. But we think the better authority is with the appellant."

The appellant argues against the applicability of this rule in this instance for the reason that he claims that, at the time he was in the shack, he was in such condition that, although he was physically present, he cannot be said to have been mentally present. This was a question, however, upon which there was conflicting evidence, the most of it being to the effect that

he was perfectly conscious of all that was going on, and testimony was introduced as to statements he made himself at that time, from which the jury could have well been satisfied that he was perfectly conscious of all that was transpiring. Not only this, but a great deal of other testimony in the case, including the defendant's own statement given at the coroner's inquest, is nearly conclusive that he was both physically and mentally present in the fisherman's shack.

It is finally argued that the evidence was insufficient to sustain the verdict. The defendant's theory was that the deaths occurred from an explosion of gasoline, which was used as the motive power of the dredge. The theory of the state was that the explosion was caused by dynamite thrown by the defendant into the cabin where the deceased were sitting. We see no necessity of detailing all the evidence, direct and circumstantial, introduced for and against the defendant. It was amply sufficient to prove beyond a reasonable doubt all the elements necessary to constitute murder in the first degree. If the jury believed the evidence of the state, there was established the premeditation, deliberation, the unlawful, wilful, felonious and malicious design, and the acts done in fulfillment of it, which established the defendant's guilt.

Finding no error, the judgment is affirmed.

PARKER, C. J., HOLCOMB, MITCHELL, and HOVEY, JJ., concur.

[No. 16758. Department Two. March 16, 1922.]

ELLIS-MYLROIE LUMBER COMPANY (FORMERLY ROGERS MYLROIE LUMBER COMPANY), *Respondent*, v. P. T. BRATT *et al.*, *Defendants*, ST. LUKE'S HOSPITAL, *Defendant and Appellant*, COMMERCIAL SASH & DOOR COMPANY *et al.*, *Interveners and Respondents*, UNITED STATES FIDELITY & GUARANTY COMPANY, *Defendant and Appellant*.[1]

MECHANICS' LIENS (40-1)—PROCEEDINGS TO PERFECT—NOTICE TO OWNER. A materialman's notice of intention to the "owner" of the premises is sufficient where it was addressed to and received by Dr. W. as an individual who was president of, and had the general management of the owner, a corporation, and the building permit had been issued in his name.

SAME (65)—CLAIM OF LIEN—AMENDMENT. Where a contractor had been doing business in the name of a construction company, a notice of intention to claim a lien for materials furnished at the request of such company may be amended at the trial to show that it was at the request of the contractor; the rule of liberal construction applying to notice of intention as well as to the notice of lien.

SAME (45, 47)—CLAIM OF LIEN—OWNERSHIP OF PROPERTY. A materialman's claim of lien sufficiently states the name of the owner or reputed owner, although it includes as owners two persons who have no interest in the property.

SAME (45, 54)—CLAIM OF LIEN—DESIGNATION OF CONTRACTOR. A materialman's claim of lien sufficiently designates the person to whom the material was furnished although it gives the name of but one of the three contractors.

SAME (40-1)—PROCEEDINGS TO PERFECT—NOTICE TO OWNER. A notice of intention to claim a lien, addressed to the president of the owner in care of the architect for the building, and by him received and delivered to the president, is sufficient.

SAME (55)—NOTICE—TERMS OF CONTRACT. There is no merit in an objection to a lien notice because of no evidence of the terms of a subcontract, where the notice followed the requirements of the

[1]Reported in 205 Pac. 398.

statute with the additional clause that one B. was a subcontractor, and the architect testified that the materials were furnished by the claimant.

SAME (32)—RIGHT TO LIEN—CONTRACTORS—SERVICES OF WORKMAN—MACHINES. A lien may be claimed by one who furnished to the contractors a sanding machine and a man to operate it under a contract to pay $2.50 an hour for the machine and man.

SAME (341)—RIGHT TO LIEN—MODIFICATION OF CONTRACT—EXTRAS. Contractors are not entitled to a lien of ten per cent upon extra work performed on written orders, under a contract allowing same in case of extras furnished under an emergency, where there was no emergency, but the extras were furnished under a clause providing for a written notice and prior agreement as to the price of the extras; there having been no waiver of the terms of the contract.

Cross-appeals from a judgment of the superior court for King county, Hall, J., entered April 6, 1921, upon findings in favor of certain lien claimants, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

McClure & McClure, for appellant United States Fidelity and Guaranty Company.

Bausman, Oldham, Bullitt & Eggerman, for appellant St. Luke's Hospital.

C. A. Schneider and *Thos. Bain*, for appellants Bratt, Headrick & Headrick.

Alexander, Bundy & Swale, for respondent Ellis-Mylroie Lumber Company.

Riddell & Brackett and *Dwight N. Stevens*, for respondent F. T. Crowe & Company.

Carl J. Smith (*Harry Ellsworth Foster*, of counsel), for respondent Edwin Strom.

Elias A. Wright and *Sam A. Wright*, for respondent Commercial Sash & Door Company.

Roberts & Skeel and *J. J. Geary*, for respondent J. W. Merriman.

MAIN, J.—The plaintiff brought this action for the purpose of foreclosing a lien for material furnished in the construction of a building. Certain other lien claimants, the contractors, the bonding company and the owner of the building were made parties to the action. The trial resulted in findings of fact, conclusions of law and a judgment sustaining the right of a number of lien claimants to recover. From this judgment, the bonding company appeals, and the contractors prosecute a cross-appeal.

The statement of the case in the appellant's brief is correct and will be substantially adopted. On June 5, 1919, John W. Wilkins and wife, being the owners of two lots in the city of Seattle, conveyed the same to St. Luke's Hospital, a corporation. The deed was filed for record on June 11 of that month. On June 23, St. Luke's Hospital entered into a contract with Phillip T. Bratt, J. R. Headrick and R. R. Headrick, as contractors, for the erection on the property of the hospital building. The United States Fidelity and Guaranty Company became surety upon the bond of the contractors. The building was completed and accepted about July 13, 1920. This action was begun by Ellis-Mylroie Lumber Company to foreclose a lien claimed by it for the lumber furnished and used in the construction of the building. The Commercial Sash and Door Company, J. W. Merriman, F. T. Crowe & Company, Edwin Strom and R. N. Smith intervened, likewise praying foreclosure of liens claimed by them. While the issues were being framed, the two Headricks and the United States Fidelity & Guaranty Company were made parties.

We will first consider the case of Ellis-Mylroie Lumber Company. The bonding company claims that this company's claim of lien should fail because, first, it

did not give the notice of intention to claim a lien as required by the statute; and second, that the claim of lien as filed did not meet the requirements of the lien statute. The notice of intention was addressed to Dr. J. Wilkins, Cobb Building, Seattle, Washington, and was dated July 11, 1919. Prior to this claim and on June 11, Dr. Wilkins and wife had conveyed the property to the St. Luke's Hospital. Rem. Code, § 1133 (P. C. § 9706), among other things, provides that every person furnishing materials to be used in the construction of a building shall, not later than five days after the date of the first delivery, deliver or mail to "the owner or reputed owner" of the property upon which such materials are to be used a notice in writing stating that such person has commenced to deliver the materials and that the lien may be claimed therefor. At the time the notice of intention was mailed to Dr. Wilkins, the title to the property was in St. Luke's Hospital. The point here is that the notice was not sent to the owner or reputed owner of the property, as required by the statute. St. Luke's Hospital was a corporation and Dr. Wilkins had the general management and had control of its affairs, and was also president. The notice was received by him through the mail. The building permit was taken out in his name, and the business address of the St. Luke's Hospital was at the office of Dr. Wilkins in the Cobb building. This evidence shows that, if the notice had been addressed to the St. Luke's Hospital, the owner, it would have been delivered to Dr. Wilkins at his office in the Cobb building, as president and manager of the hospital. In the case of *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E 739, a notice was mailed to the wrong street address of the owner of the property by one furnishing mater-

ial to be used in the construction of the building, and the correct address was placed upon the letter by the post office authorities and was received by the owner in due course. It was there said:

"We are clearly of the opinion that this was error not in the least prejudicial and not impairing respondent's lien right. The purpose of the address, of course, is to have the notice reach the owner, and when the address is sufficient to accomplish that purpose the court should not further inquire as to its sufficiency."

There can be no difference in principle between that case and the present. There the notice was sent to the wrong address and was corrected in the course of transmission and received by the owner. Here the notice was addressed to a person not the owner and was received by him as the representative of the owner. Had the notice been addressed to the owner, the only difference would be that it would have been received by Dr. Wilkins as president and manager of the corporation and not as an individual. We think the error in the notice was in no wise prejudicial and was not such as to impair the right of the claimant to a lien.

There is a further objection to the notice of intention to claim a lien in that it does not recite the name of the contractor or agent as required by the statute. The notice recites that the material was being furnished at the request of the King County Construction Company. Upon the trial, the Ellis-Mylroie Company asked leave to amend a notice by inserting in lieu of King County Construction Company the name of P. T. Bratt. No prejudice could result to the appellant by reason of such an amendment and it was a proper one to be made. *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727. The sta-

tutory rule requiring the provisions of the law relating to liens to be liberally construed applies to the notice of intention to claim the lien as well as to the notice of lien. *Ehrlick-Harrison Co. v. Cushman,* 86 Wash. 190, 149 Pac. 708.

The second point is that the claim of lien as filed did not comply with Rem. Code, § 1134 (P. C. § 9710), which, among other things, requires that a notice of claim of lien shall state the person to whom the material was furnished, the name of the owner or reputed owner of the property, if known. The notice of claim of lien filed in this case recited that the materials were furnished at the request of P. T. Bratt. It does not mention the other two contractors. The contract was signed by Phillip T. Bratt, J. R. Headrick and R. R. Headrick, as contractors. The lien claim recited that the owners or reputed owners of the property were John W. Wilkins and Alice Wilkins, his wife, and the St. Luke's Hospital. It will be observed that this notice of claim of lien not only gives the St. Luke's Hospital as owner, but also Dr. Wilkins and wife. The fact that it recited persons as owners who had no interest in the property, while also giving the name of the actual owner, cannot be considered a material defect in the claim of lien. *McHugh v. Slack,* 11 Wash. 370, 39 Pac. 674. It is true that the claim of lien recites that the material was furnished at the request of P. T. Bratt, and does not mention the other two parties to the contract. The evidence shows that, prior to this time, Bratt had been purchasing material from the Ellis-Mylroie Lumber Company under the name of the King County Construction Company, and the first few loads of material furnished under this contract were delivered to him as such. After these few loads had been delivered, he notified the materialman not to bill the

lumber to the King County Construction Company, but to himself. Bratt then informed Ellis-Mylroie Company that he was the contractor. The officers of the company had not seen the building contract and did not know that it was signed by parties other than Bratt until after the claim of lien in this case had been filed. The material for which the lien was claimed was delivered at the place where the hospital was being constructed, and was used in its construction.

The statute requires that the notice of claim, as near as may be, shall state the name of the person to whom the material was furnished. This is not an absolute requirement making the lien claimant at his peril know the names of all the parties who may have signed the building contract. Such a contract not being one which is made a matter of record, it is easy to conceive that in many instances it might be difficult for the materialmen to ascertain exactly the names of the persons signed thereto. Rem. Code, § 1147 (P. C. § 9722), provides that the provision of law relating to liens such as that here in question, and all proceedings thereunder, shall "be liberally construed with a view to effect their objects." It seems to us that it would be a harsh and technical rule which would require the materialman at his peril to know the names of all the contractors. The fact that the notice of lien did not recite the names of Headrick in no wise caused any prejudice.

The bonding company claims that the lien of the Commercial Sash and Door Company should be disallowed because, first, the notice of intention to claim the lien is not in the form prescribed by law; and second, because the claim of lien as filed for record was insufficient. The notice of intention to claim the lien was addressed "to Dr. John W. Wilkins, agent,

St. Luke's Hospital, 308 Cobb Building, City." He recited that the material was furnished at the request of "P. T. Bratt, contractor or agent." The objection to this notice of intention is that it is not addressed to the owner, but to Dr. Wilkins, as agent of the owner, and that the contractor is recited as P. T. Bratt, instead of Bratt, Headrick and Headrick. It is unnecessary to discuss again the sufficiency of the manner in which this notice is addressed. What has already been said in the case of the Ellis-Mylroie Lumber Company covers the matter. This notice, in addition to that recited in the other case, refers to Dr. Wilkins, as agent of St. Luke's Hospital, which was the owner. The objection to the lien notice was that it described the contractor as P. T. Bratt, and not as Bratt, Headrick and Headrick. This question is also covered by what has been said in the Ellis-Mylroie Lumber Company case.

The bonding company objects to the allowance of the claim of J. W. Merriman because, first, the notice of intention was insufficient; and second, because the lien notice was defective. The notice of intention was addressed to "J. W. Wilkins, care J. R. Nevins, Hoge Building, Seattle." J. R. Nevins was the architect for the building and testified that the notice was received and by him delivered to Dr. Wilkins, and Dr. Wilkins testified that he received it.

This case is covered by what is said in the Ellis-Mylroie Lumber Company case, *supra*, and for the reasons there stated, the notice was sufficient.

The objection to the lien notice appears to be that there was no evidence submitted to the court showing the terms of an alleged contract with one Berto, who was a subcontractor. The notice of claim of lien followed the requirement of the statute (Rem. 1915 Code, § 1134; P. C. § 9710), with the additional clause added

that Berto was a subcontractor. The architect testified to the fact that Berto was a subcontractor and that the materials furnished by the claimant were used in the building. The objection to the notice of lien appears to be without merit.

The next case to be considered is that of Edwin Strom, who was employed by P. T. Bratt, one of the contractors, to furnish what is called a sanding machine and a man to operate it, at the agreed price of $2.50 per hour. It is for this service that the lien is claimed in this case. The position of the appellant is that the contract was for $2.50 for the machine and $1.50 for the man to operate it, but we do not so understand the testimony. It may be that the testimony on this question is not as clear as it might be, but the only reasonable inference to be drawn from it is that the $2.50 was for the machine and the man to operate it. Whether it would make any difference in the result if the price for the machine and the amount to be paid the operator were segregated, it is not necessary here to determine.

The appellant cites a line of cases such as *Hall v. Cowen,* 51 Wash. 295, 98 Pac. 670, and *Gilbert Hunt Co. v. Parry,* 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B 225, as well as cases from other jurisdictions, which hold that, where there is simply the leasing or rental of a tool or machine, and the one to whom it is leased or contracted furnishes the operator, no right of lien exists. But those cases do not control where an operator is furnished with the machine. The cases of *Potter Manufacturing Co. v. A. B. Meyer & Co.,* 171 Ind. 513, 86 N. E. 837, 131 Am. St. 267, and *Wood, Curtis & Co. v. El Dorado Lumber Co.,* 153 Cal. 230, 94 Pac. 877, 126 Am. St. 80, 16 L. R. A. (N. S.) 585, recognizes this distinction. While in each of these cases

the claim for lien was denied, it was in effect stated that, if the owner of the machine had furnished the operator of the machine, the claim for lien would have been sustained.

In *Chavelle v. Island Gun Club,* 77 Wash. 304, 137 Pac. 511, one Hall had a contract for the construction of a dike. In carrying out this contract the principal contractor entered into an agreement with the Everett Construction Company whereby that company was to do the work of dredging, furnishing its own dredger and the operating crew. After the work was completed, a lien was claimed by the construction company and sustained by the holding in that case. It is true that the construction company there was treated as a subcontractor, but the same reasoning which would sustain its right of recovery would sustain that of Strom here. The holding there is based upon the theory that it was the intention of the law makers to provide a lien for every person supplying materials going directly into a structure, or performing labor directly thereon. The lien was sustained on the theory that the operation of the dredge by the crew furnished by the owner thereof was labor which went into the dike, within the meaning of the statute. In this case the work done by the sanding machine and the operator was that of smoothing the floors in the building, and, of course, was labor performed directly upon it.

The case of F. T. Crowe & Company, is controlled by what has been hereinbefore said and does not require detailed discussion.

As above stated, from the judgment entered, the contractors prosecuted a cross-appeal. Upon their appeal they contend, first, that the claim of J. W. Merriman should not have been allowed; and second, that the amount of the judgment in favor of Ellis-Mylroie Lum-

ber Company was in too great an amount; and third, that there should have been allowed against the owner a greater sum for extras than was awarded them. As to the Merriman claim, no discussion is required because that matter is covered in what has been hereinbefore said in the appeal of the bonding company.

As to the Ellis-Mylroie Company, the contractors claim that the judgment in favor of that company is too high, in that it includes overcharges for material furnished and fails to give credit for materials returned, as well as damages for failure to deliver a proper grade of flooring. It will be unnecessary to discuss the evidence bearing upon these items in detail. The evidence offered in behalf of the Ellis-Mylroie Company tends to establish that, after the material had been furnished, there was a meeting between a representative of that company and one of the contractors, wherein the whole matter was discussed and the settlement made. It is true that the evidence upon this question is conflicting, but after giving attentive consideration to the record, we are of the opinion that the conclusion of the trial court was right and should be sustained.

As to the claim for extras against the St. Luke's Hospital, the contractors contend, as already stated, that the judgment was not in sufficient amount. The extras may be divided into two classes: One, those which were put in upon written orders, and as to this class it is claimed by the contractors that they were entitled to ten per cent upon the cost price; and the other class was extras which they claim had been put in, but without any written order, and they seek to recover upon the theory that the provision in the specification relative to a written order had been waived. The specification referred to provides that nothing in

the nature of extra work shall be done except upon the written order of the architect, countersigned by the owner, and in all cases where extra work is ordered, the cost shall be agreed upon and included in the order. There is a further provision that if, by reason of any emergency, it is necessary to proceed at once with the work, then the contractor shall render the architect an itemized account of the labor and materials expended, immediately after the completion of the work, showing the exact cost, upon which a profit of ten per cent would be allowed. Under this contract, where extras were put in under a written order and the cost thereof agreed upon, there was no allowance of the ten per cent. The extras which were allowed came within this class, and the trial court was right in disallowing the ten per cent. As to the other extras, whether the provision of the contract had been waived, the evidence is conflicting, the evidence in support of the contractors being to the effect that there was a waiver, and the evidence offered on behalf of the owner being to the opposite effect.

The record makes it plain that, as to this class of extras, there was no written order given, and they were not put in as emergency work. The only theory upon which the contractors would be able to recover would be that of a waiver. The trial court expressly found that the provisions of the building contract requiring "written order of the architect were not waived."

The evidence sustains this finding.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16822. Department One. March 16, 1922.]

WILLIAM CROOKS, *Appellant*, v. W. R. RUST *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS (443, 469)—STREETS—OBSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED. It cannot be said that an auto driver was guilty of contributory negligence, as a matter of law, in driving in the night-time between two red lights thirty feet apart, on the principal thoroughfare of a large city, and striking the end of a derrick pole extending from a truck parked at the curb for unloading where a building was under construction, it appearing that he did not see the pole, which was unlighted and extended to the center of the street four feet above the surface.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered August 12, 1921, upon granting a nonsuit, dismissing an action for damages sustained through an obstruction in a street. Reversed.

P. L. Pendleton, for appellant.

Shorett, McLaren & Shorett, James B. Murphy, and *Ward C. Kumm*, for respondents.

MITCHELL, J.—Appellant sued a number of defendants to recover for personal injuries. The case has taken such a course that the only defendant who took part in the trial and that now remains in the controversy is the Georgetown Transfer Company, a corporation, respondent here. The case was tried before a jury and, at the conclusion of appellant's proof, a nonsuit was granted upon the motion of the transfer company that there was a failure of proof of any negligence on its part, and that it affirmatively appeared that the proximate cause of the injuries was the negligence of the plaintiff.

[1]Reported in 205 Pac. 419

Some of the important facts were understood in slightly different ways by the witnesses who testified, but taking the proof tending most strongly to support the judgment, the facts are substantially as follows: Work had been commenced in the construction of the Rust Building, at the northwest corner of Pacific avenue and Eleventh street, in Tacoma. The avenue, the principal thoroughfare of the city, runs north and south, and Eleventh street traverses it at right angles. The avenue is sixty-eight feet wide between curbs and has on it two street car tracks, one on each side of, and near the center of, the avenue. The excavation for the building had been completed. About three o'clock in the morning, while it was yet dark, though a clear dry night, two derrick poles were being unloaded by the respondent into the excavation to be used in construction work. The poles were about eighty or ninety feet long and had been placed on either side of a truck belonging to the respondent, extending about thirty-five feet both to the rear and in front of the truck. The truck had been backed up to the westerly curb of the avenue, some forty or fifty feet north of Eleventh street, and headed in a northeasterly direction, so that the forward ends of the poles extended out to the center of the avenue and were about four feet above the surface of the avenue. Appellant came into collision with one of the poles.

At the time of the accident, it appears that the truck had been at that place about an hour, during which time one of the poles had been raised clear of vehicular traffic, and the workmen engaged in unloading were all on the south side of the truck. There was no one representing the respondent, nor any barrier, situated on the north side of the truck. There was a red light on the surface at the center of the avenue about twenty

feet north of the ends of the poles, and another red light on the surface of the avenue five or six feet from the curb and about due west from the light in the center of the avenue. There was no light or flag upon the poles, and there was a single Presto light in use on the front of the truck as it faced diagonally across the avenue. The cluster street lights were burning. The appellant, driving a Detroit "bug", travelled south, near the center of, but on the right-hand or westerly side of, the avenue, at a speed estimated by the different witnesses of ten to twenty-five miles an hour. He was familiar with the avenue and testified that he was observant as he approached the place at which the accident occurred. He testified that he noticed the red light out in the center of the avenue, also the one near the curb, which he took to be the same as a red light he had on former recent occasions observed at that point on the corner or north end of a temporary wooden structure in front of the Rust Building, erected to protect pedestrians using the sidewalk. Both of his front lights were in use and in good condition, showing the surface of the street for one hundred to one hundred and fifty feet. He testified he did not see the pole until just the moment he ran into it. The top of his car, including the wind shield and steering wheel, were entirely destroyed, and he was severely injured.

In our opinion, the questions in the case were questions for the jury. The appellant ran into an object which, in all reasonable considerations for his safety, might as well have been suspended in the air, as it had for its support a truck situated entirely out of the reach of the lights of his car. The obstruction was situated on the most heavily travelled street of a large city and must necessarily continue as an ob-

struction for a considerable period of time before the unloading was completed. Nor is there anything very unusual in a single red light on the ground in the center of a street. The street was a broad one and the space of about thirty feet between the two red lights was equal to that of an ordinary street. There was nothing in the situation to warrant the conclusion, as a matter of law, that the appellant, who was already familiar with the red light at or near the location of the one near the curb, should, in the exercise of ordinary and reasonable caution and prudence, have considered the two red lights as a warning that the whole of the west side of the avenue was unsafe for travel. As testified to by a policeman, the appellant was the only one travelling on the street at that time, and that he was driving in a proper place and in a proper manner.

Reversed, with directions to grant a new trial.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16892. Department Two. March 16, 1922.]

E. L. IRWIN, *Respondent*, v. J. K. LUMBER COMPANY *et al.*, *Appellants*.[1]

FISH (6)—LICENSES—RIGHTS UNDER. Rights acquired under a roving fishing license, although fixed by a definite location and survey, are not vested rights in real property.

LIMITATION OF ACTIONS (19, 19-1)—INJURY TO OR TAKING OF PROPERTY. An action against a public service corporation for destruction of or injury to a fishing location, occupied under annual state licenses, is subject to the three-year statute of limitations [Rem. Code, § 159] for injuries to personal property or other injury to the person or rights of another, whether considered as an action in tort, or one of implied contract for taking property without condemnation and prepayment of compensation.

SAME (65-1)—TOLLING—NEW ACTION AFTER FAILURE OF FORMER ACTION. Rem. Code, § 173, tolling the statute of limitations in case a judgment for the plaintiff be reversed if an action be commenced within one year thereafter, does not apply where no cause of action was stated or existed when the first cause of action was commenced; hence limitations upon an action for damages to a fishing location are not tolled by plaintiff's prior injunction suit in which judgment for plaintiff was reversed on the ground that injunction did not lie against the public service company.

Appeal from a judgment of the superior court for Skamania county, Kirby, J., entered June 15, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Platt & Platt, Montgomery & Fales, and *Corwin S. Shank*, for appellants.

Miller, Wilkinson & Miller, for respondent.

MACKINTOSH, J.—The respondent was the owner of certain fishing rights in the Columbia river, which he used under a yearly license procured from the state department of fisheries, and he alleges that, in the

[1]Reported in 205 Pac. 424.

fall of the year 1913, the defendants, or their predecessors, constructed in the Columbia river a trestle and booming ground which destroyed the value of his fishing location. This action was commenced in 1919, for the purpose of recovering for damages thus suffered, and resulted in a judgment in respondent's favor, from which the appellants have prosecuted this appeal, arguing the defense of the statute of limitations, which they claim bars the respondent's right of action.

The respondent has had, every year since 1910, a license from the state which allows him to fish during the fishing season each year, and while the license makes no reference to any location, yet, under the law, the respondent, if he has located in a definite place, made and filed a survey thereof and posted proper notices, and has fished the location as provided by law, then, under the law, he has a right to continue at such location. A determination of the nature of this right owned by the respondent is necessary in order to apply the proper statute of limitations to this action.

This court has held that the rights acquired under license and location are not real property rights and create no interest in realty, but are merely licenses and personal rights and personal property. In *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, 69 Pac. 776, the court said:

"The license to fish in the waters of the state which the statute authorizes the fish commissioner to issue is a roving license. It runs only for a limited period —one year—and all rights acquired thereunder cease at the expiration of the license. While under it the holder may locate and occupy exclusively during its life a fixed location, he acquires no title to real property in so doing."

The case of *State v. Hals*, 90 Wash. 540, 156 Pac. 395, dealt with a license and location exactly similar to the ones possessed by the respondent here, and held:

"Counsel for appellant proceed upon the theory that appellant's right to the fishing location and to take fish therefrom became, by virtue of his survey, location and occupancy thereof under the former law, a property right which could not thereafter be disturbed or taken from him without compensation, by repeal of the law under which he acquired the right. We are quite unable to see that the right, secured to appellant through his location made under the former law, amounted to anything more than a mere license from the state. We think it was not a grant from the state passing an irrevocable privilege to either occupy or take fish from the location. Nothing could seem plainer than that a general license to fish in the waters of the state is not irrevocable, and it seems equally plain to us that a license or privilege acquired by appellant to occupy this particular fishing location is equally revocable by repeal of the law under which it was acquired and the enactment of new and other regulations pertaining to fishing."

A literal reading of the complaint would lead one to the conclusion that it was an action in tort to recover damages for the trespass committed by the construction of the trestle and booming grounds. The respondent, however, interprets the complaint differently and apparently tried his case upon another theory, to wit, that the appellants, being public service corporations with the right of eminent domain, have taken and damaged respondent's property without having resorted to an action for condemnation, and that in this suit the respondent may recover compensation for the taking of his private property without payment. The respondent, in his brief, simplifies the questions which we have to determine, by this statement:

"In so far as the question of loss of profits is concerned, while there was testimony submitted upon that point, the respondent's attorneys concluded before the trial ended, that the correct measure of damages was the reasonable value of the property at the time of the taking, and that the question of interest was a matter for the court, and thus our case was tried, the jury awarding $5,000 as the value of the property at the time of the taking in the fall of 1913."

Whether the action is one based upon tort or is such an action as the respondent claims it to be, makes no difference, so far as the statute of limitations is concerned. Either action would be barred by the three-year statute. Subdivision 2, § 159, Rem. Code (P. C. § 8166), provides:

"An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated—"

shall not be maintained after three years.

It is the respondent's contention that his action was not barred for a period of ten years, and relies upon the case of *Aylmore v. Seattle,* 100 Wash. 515, 171 Pac. 659. In the *Aylmore* case the court was considering the application of the statute of limitations where the property taken by the city without condemnation was real property, and held that the property owner was not barred of a right of action to recover the value of the land which had been taken by a municipality for a public use without compensation until such time as he had lost his title by adverse possession, that is, ten years. The case before us, however, as we have seen, does not involve any question of the taking or damaging of real property, and the *Aylmore* case, therefore, could have no application.

But the respondent's case seems to fall directly within the rule announced in *Jacobs v. Seattle,* 100 Wash. 524, 171 Pac. 662, L. R. A. 1918E 131, which was a case brought against the city of Seattle for compensation for the construction of a nuisance, where the city, although having the power of eminent domain, had not condemned the right to interfere with Jacobs' rights. The court there held that subd. 3 of § 159, Rem. Code (P. C. § 8166), applies, and an action to recover compensation for damages resulting from the operation of an incinerator by the city in the exercise of its power of eminent domain, where, however, it had not condemned, is an action not involving real property, but is an action arising from implied contract or liability, the action not being one arising from the taking of the real property, but merely for damaging it.

Respondent calls attention to § 173 of Rem. Code (P. C. § 8180), and claims that the statute of limitations has been tolled by reason of the fact that, in 1916, he instituted a suit in equity against the J. K. Lumber Company, one of the appellants, to enjoin it from using the booming grounds and trestle which had destroyed respondent's rights. That case came to this court on appeal and is reported in *Irwin v. J. K. Lumber Co.,* 102 Wash. 99, 172 Pac. 911, where a judgment in respondent's favor was reversed, and it was held that injunction would not lie to restrain a public service corporation from using lands acquired by it for, and already put to, a public use, and the action was dimissed. The present action was commenced within one year after the reversal of the prior action. We have held in *Ryno v. Snider,* 58 Wash. 457, 109 Pac. 55, that § 173, Rem. Code (P. C. § 8180), does not apply where no cause of action was stated or existed at the time the

first action was commenced, consequently here the respondent can receive no benefit from the section.

The case at bar clearly comes within the three-year statute relating to damages to personal property. The trial court should have granted judgment to appellants dismissing the respondent's case. Its action in failing to do so was error, and its judgment is reversed.

PARKER, C. J., FULLERTON, HOLCOMB, and HOVEY, JJ., concur.

[No. 16932. Department Two. March 17, 1922.]

GEO. MILLER *et al., Respondents,* v. FRANK A. SMITH *et al., Appellants.*[1]

PARTIES (42-1)—PLEADINGS (110)—AMENDMENT BRINGING IN NEW PARTIES. In an action for breach of covenant, it is not error to allow a trial amendment bringing in the wives of the defendants, where there was no prejudice and no surprise claimed or continuance asked.

JUDGMENT (219)—BAR—DISTINCT CAUSES. A judgment dismissing an action of unlawful detainer for vendors' failure to deliver possession of land upon which there was a growing crop is not *res adjudicata* or a bar to an action by the vendee for breach of covenant for loss of the crop removed by vendors' tenant.

DEEDS (19-1)—PRINCIPAL AND AGENT (63)—ACCEPTANCE OF BENEFITS—DELIVERY—RATIFICATION. Where a bank, acting as vendors' agent, delivered a deed on payment of the price, without securing execution of a contract allowing vendors to remove a crop, contrary to its instructions, vendors' acceptance of the price with knowledge of the facts ratifies the delivery of the deed.

ESCROWS (1)—NATURE AND REQUISITES. A bank holding a deed as agent of the vendors for delivery and collection of the price is not an escrow holder, so as to invalidate a delivery made contrary to instructions, without performance of a condition precedent.

ACTIONS (14)—FORM—CONTRACT OR TORT. The distinction between forms of action having been abolished, an action for the loss

[1]Reported in 205 Pac. 386.

of a crop wrongfully removed by defendants' tenant, after defendants' sale to plaintiff, is susceptible of interpretation as one for breach of covenant; and will therefore not be dismissed as one in tort for conversion for failure to join the tenant.

VENDOR AND PURCHASER (127)—RIGHTS AND LIABILITIES—BONA FIDE PURCHASERS—POSSESSION. Purchasers of premises become the owner of a growing crop thereon, as against a tenant under an unrecorded lease, as bona fide purchasers, where they had no notice of the lease or of any rights of the tenant.

PLEADINGS (104)—AMENDMENTS—TO CONFORM TO PROOF. Damages in excess of the amount claimed may be allowed under an amendment to conform to the proof, where evidence thereof was received without objection.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 14, 1921, upon findings in favor of the plaintiffs, in an action for conversion, tried to the court. Affirmed.

Louis A. Merrick, for appellants.

Coleman & Fogarty and *W. P. Bell,* for respondents.

MACKINTOSH, J.—On August 30, 1920, the appellants sold to the respondents a small farm for the sum of $14,000, upon which a crop of potatoes was growing, which the trial court found to be of the value of $1,500. The appellants remained in possession of the farm until the first of November, 1920. During this time the potatoes had been harvested by a Japanese, who held an unrecorded lease for the season upon the portion of the farm in which the potatoes grew. Respondents began this action, seeking to recover the value of the crop of potatoes. Further facts will appear in the discussion of the various assignments of error, the first of which is that the court erred in allowing the respondents to amend their complaint at the close of their evidence so as to bring in as parties plaintiff the wives of the respondents. This was upon the theory that

the action was not one for damages for conversion, but was an action for damages for breach of the covenants in a deed, and being such, the wives were necessary parties.

It was not error to permit this amendment where there was no claim of surprise or request for continuance, and where, as here, the bringing in of new parties caused no change in the issue which had been presented by the pleadings and the evidence. *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926; *Robbins v. Wyman, Partridge & Co.*, 75 Wash. 617, 135 Pac. 656.

After the court had allowed the respondents to make this amendment, the appellants were permitted to amend their answer by setting up an additional affirmative defense, in which they alleged that theretofore the respondents had begun an action against the appellants which involved the right of possession of the identical real property in controversy in this case, and that in that action a judgment had been rendered in favor of the appellants here, and that that judgment was *res adjudicata* of the present action. The court refused to permit the introduction of this evidence, which is the second assignment of error. The files showed that was a suit against the appellants seeking to oust them from the premises under the unlawful detainer statute, for the reason that they had not surrendered possession at the time of the conveyance to the respondents. It will be seen, therefore, that that action in no wise involved the breach of the covenants of the deed which are involved in the present action, and the dismissal of the previous action was justified for the reason that the unlawful detainer statute did not apply, as the appellants had come legally into possession of the property and the respondents should have pursued an action

in ejectment. Although the actions were between the same parties, the recovery sought in each was entirely different and the issue in this case could not have been tried out in the former one. For that reason the court was correct in its ruling, as the judgment in the former action was not *res adjudicata* of this.

The next assignment of error is that there was no delivery of the deed of August 30, 1920. The testimony shows that the appellants signed, sealed and acknowledged the deed and delivered it to a bank, which was to notify the respondents, who were to come and receive it upon the payment of the purchase price. At the time of the delivery of the deed and abstract to the bank, the appellants seem also to have delivered an agreement, signed by themselves, which provided for their being allowed to retain possession of the property until the first of November, 1920, to enable them to remove the crop and their personal property from the premises. This agreement was never signed by the respondents, and the deed was delivered by the bank to them without any reservation, the respondents paying the full purchase price, which was shortly thereafter turned over by the bank to the appellants, who at the time had notice of the fact that the respondents had not signed the agreement, which the appellants now assert was a condition precedent to the right of the bank to deliver the deed. We cannot say that this invalidated the delivery. The bank was the agent of the appellants, and although it may have violated its duty to its principal, its delivery to the respondents carried the title. Moreover, the acceptance by the appellants of the purchase price, with full knowledge of the fact that the contract which they desired to have the respondents enter into had not been agreed to or executed, acted as a ratification of the delivery, the

validity of which, as far as the respondents are concerned, cannot now be attacked. *Petticrew v. Greenshields,* 61 Wash. 614, 112 Pac. 749.

It is appellants' contention, however, that the delivery to the bank was an escrow delivery, and that the rule is that delivery by the escrow holder does not become effective until the conditions upon which the escrow is created have been performed. As we have already indicated, the bank was not holding the deeds and instruments under an escrow agreement, but only as the agent of the appellants. *Nelson v. Davis,* 102 Wash. 313, 172 Pac. 1178.

There are several other assignments of error which are based upon the alleged failure to deliver the deed, but which are unnecessary to be considered, in view of our approval of the lower court's finding that there had been a delivery.

It is next contended that the judgment cannot run against the appellants for the reason that the potatoes were taken out by the Japanese tenant. This, of course, is upon the theory that the action is one of conversion, but though the complaint may be susceptible to interpretation as one seeking damages for conversion, yet, under our statutes and practice, the distinctions between forms of action have been abolished, except as applied to certain special actions, and the form or manner of allegation or prayer has become immaterial. *Meeker v. Gilbert,* 3 Wash. Terr. 369, 19 Pac. 18; *Watson v. Glover,* 21 Wash. 677, 59 Pac. 516; *Dormitzer v. German Savings etc. Society,* 23 Wash. 132, 62 Pac. 862; *Dunlap v. Rauch,* 24 Wash. 620, 64 Pac. 807. The complaint here is subject to interpretation as one for breach of the covenants of a deed.

The lease from the appellants to the Japanese not having been recorded, and the respondents having no

actual notice of such a lease, or of any rights which the Japanese may have had, they were innocent *bona fide* purchasers for a valuable consideration, and an action by them upon the covenants cannot be defeated upon the theory that, at the time they took title to the property they knew of any rights of any third parties. At that time they became the owners of the growing crop (*Woody v. Wagner*, 89 Wash. 429, 154 Pac. 819), and were entitled to its possession, which was never delivered to them by the appellants. The damages awarded to the respondents were based upon the actual tonnage of the potatoes harvested, at the fair market price, plus the $50 for the fair rental value of the land for the two months in which the appellants unlawfully occupied it, and, as we read the appellants' brief, no objection is made to the measure of damages, the only criticism in that regard is that whereas the complaint only asked for the sum of $1,250, the judgment was for $1,550. This amount was well within the testimony. The trial court in allowing this amount said:

"That is not exactly the amount claimed by plaintiffs, but is the testimony and the evidence, and it went in without objection, and I assume that the pleadings may be amended to conform to that proof."

No exception was taken by the appellants to this ruling of the court, and finding no error in the record, we affirm the judgment.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16724. *En Banc.* March 17, 1922.]

S. G. HARDIN, *Respondent*, v. STATE BANK OF SEATTLE, *Appellant.*

STATE BANK OF SEATTLE, *Appellant*, v. C. W. MARTIN, *as Trustee etc., et al., Respondents.*[1]

CHATTEL MORTGAGES (49)—RIGHTS AND LIABILITIES—USE AND DISPOSITION BY MORTGAGOR. A finding that a chattel mortgagee of automobiles allowed the mortgagor, a dealer, to sell the cars to innocent purchasers without obtaining a satisfaction of the mortgage is not sustained by proof of loose expressions to the effect that he might sell, but could not make delivery until after release of the mortgage.

SAME (43-2)—LIEN—RECORDING—SUBSEQUENT PURCHASERS. In view of Rem. Code, § 3662, making the record of a chattel mortgage constructive notice to the world, a mortgagee of automobiles does not lose his lien by allowing the mortgagor, a dealer, to display the cars on his sales room floor and exhibit them to prospective purchasers; since they, having constructive notice, cannot be regarded as innocent purchasers.

SAME (4)—VALIDITY—STOCK IN TRADE. A chattel mortgage upon a particular automobile held in stock by a dealer is not void as a mortgage upon a shifting stock in trade, as to purchasers charged with constructive notice by record.

HOLCOMB and MACKINTOSH, JJ., dissent.

Appeal from a judgment of the superior court for King county, Brinker, J., entered May 14, 1921, upon findings in favor of the plaintiff, in consolidated actions in replevin and to foreclose a chattel mortgage, tried to the court. Reversed.

Shank, Belt & Fairbrook, for appellant.

Tucker & Hyland (*Ford Q. Elvidge*, of counsel), for respondents.

Guy E. Kelly and *Thomas MacMahon, amici curiae.*

[1]Reported in 205 Pac. 382.

TOLMAN, J.—Respondent, claiming to be the owner and entitled to the immediate possession of one certain Jordan touring car, No. 11,457, brought an action in the nature of a replevin to recover the possession thereof from appellant. Appellant answered, denying the material allegations of the complaint, and pleading affirmatively that it had a chattel mortgage on the car, duly executed and filed for record, and that it had taken, and then held, possession of the car by virtue of such mortgage. Thereafter appellant brought an action to foreclose its mortgage, alleging the necessary facts as to the loaning of the amount thus secured, the giving of the note and mortgage, the filing of the mortgage for record, and the nonpayment of the debt. Respondent, by answer, denied the material allegations of the complaint, and affirmatively pleaded that the mortgagor, the Mitchell Motor and Service Company, Incorporated, was engaged in the business of selling motor cars, and with knowledge and consent of appellant, displayed this particular car in its show rooms for sale, and, with authority from appellant so to do, sold it to respondent for its full value of $3,150; further alleging that it was the usual and customary course of dealing between the appellant and the Mitchell Motor & Service Company followed for more than two years; that appellant would furnish the money necessary to take up the bill of lading, when a shipment of cars arrived from the manufacturer consigned to the Mitchell Motor & Service Company, take and file for record a chattel mortgage on the cars so received, and then permit the Mitchell Motor & Service Company to display for sale and sell the mortgaged cars, and thereafter account to it for the proceeds of such sales. The affirmative matters were denied; the two cases were, upon stipulation, consolidated for trial, and

being tried to the court, resulted in a judgment awarding the car to respondent, with damages for its detention, and denying a foreclosure of the chattel mortgage, from which result the appellant brings the consolidated causes here for review.

The trial court, among other things, found:

"That the said above named Mitchell Motor and Service Company used the proceeds with the knowledge and consent of the said State Bank of Seattle from the sale of cars mortgaged to the said State Bank of Seattle, to repay to the said State Bank of Seattle the amounts due upon the mortgages, and that had been the custom for more than three years last past. The said above named State Bank of Seattle, by its acts in permitting the said automobile sued for herein and the other automobiles upon which they had mortgages to be placed in the show rooms of the said company for sale, and by its course of dealing with the said Mitchell Motor and Service Company to sell the cars upon which they had mortgages, are now in equity and good conscience estopped from claiming any interest in and to the car No. 11457 sued for herein, the said S. G. Hardin being the purchaser for value in good faith without notice of the claims or mortgage of the above named State Bank of Seattle."

Appellant's chief attack is directed at this finding, making it incumbent upon us to examine with care all of the evidence in the record bearing upon the course of dealing between the mortgagor and the mortgagee. This we have done, and while there is plenty of evidence showing that the mortgagor was remiss in this respect, and wrongfully disposed of mortgaged cars, there is no evidence whatever to show that appellant ever had any knowledge of, or consented to the sale of a mortgaged car in any instance. True, there are some loose expressions by appellant's officers to the effect that the mortgagor might sell, but could not make de-

livery until he had secured a release of the car sold, and that the bank expected to get its money out of the sale of the mortgaged cars; but where the mortgagee's course of dealing is clearly shown, as here, to the effect that it never gave the mortgagor reason to believe that it had any authority to sell any car until after it had procured a release of the mortgage as to such car, these expressions fall far short of establishing an intent to permit the mortgagor to sell without reference to the mortgage, or make appellant a party to the fraud upon the purchaser. Indeed, the expressions used are more susceptible of a construction which will harmonize them with the direct evidence upon the subject than the contrary, and must be held to mean that the bank's officers expected the mortgagor to find possible purchasers and make preliminary arrangements for sales, but to fully advise the intending purchaser of the incumbrance and take him to the bank for the purpose of discharging the mortgage before the sale could or should be completed, or otherwise enable him to fully protect himself against the mortgage. Such a course of dealing is the natural one, and it not having been shown that the appellant had any reason whatever to suspect the mortgagor of any dishonesty in intent or act, it cannot be held to be a party to its dishonesty.

The learned trial court felt, as all must feel, that the purchaser, in dealing with an apparently reputable concern, housed in an extensive building, and carrying a large stock, acted but naturally in neglecting to search the chattel mortgage records, and therefore placed the loss upon the bank; but while we sympathize with the purchaser, we feel that our recording statute, Rem. Code, § 3662 (P. C. § 9761), which makes every chattel mortgage duly filed and indexed "full and sufficient notice to all the world," etc., must be considered and

given some weight, and therefore the rule that the trial court attempted to apply, "when one of two innocent persons must suffer, he whose conduct was the cause of the loss must bear the loss," cannot be here applied, because, under the statute, respondent had constructive notice, and cannot in law be said to be an innocent party.

Some contention is made that, under the facts of this case, the automobile in question should be held to have been a part of a shifting stock of merchandise, and the mortgage therefore void under the rule laid down in *Keyes v. Sabin,* 101 Wash. 618, 172 Pac. 835, and *Miller v. Scarbrough,* 108 Wash. 646, 185 Pac. 625, but it must be borne in mind that those cases treat of mortgages upon a stock in trade, the description of which must be general only, and in which it is expressly provided that the mortgagor may sell in the ordinary course of trade. It has never yet been questioned, so far as we are aware, that the purchaser who, in the regular course of business, buys an article from such a stock takes good title free from the lien of the mortgage. Consequently those cases have no application here.

Our statute, Rem. Code, § 3659[1] (P. C. § 9759) authorizes the giving of a chattel mortgage on all kinds of personal property, and when, as here, such a mortgage is given upon a specifically described article without any provision for its sale, where there is no course of dealing showing authority to sell, and notice "to all the world" has been given by filing and indexing as the statute provides, we are powerless to protect the unwary purchaser. The power to do so lies with the legislature, and, under modern conditions, legislative action may well be taken. It is true that the supreme court of Virginia has taken a different view. *Boice v.*

[1]NOTE: See Rem. Comp. Stat., § 3779.

Finance and Guaranty Corporation, 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654, and *O'Neil v. Cheatwood*, 127 Va. 96, 102 S. E. 596, but Virginia is one of the few states which has adopted the rule that a mortgage on a shifting stock of goods is void *per se*. We do not consider the Virginia case sufficient authority to warrant a disregard of the plain meaning of our statute hereinbefore referred to.

The facts in this case as we find them render it unnecessary to discuss the authorities cited upon the question of equitable estoppel.

The judgment appealed from is reversed, and the cause remanded with directions to enter a decree foreclosing the chattel mortgage.

PARKER, C. J., MITCHELL, BRIDGES, FULLERTON, MAIN, and HOVEY, JJ., concur.

HOLCOMB, J. (dissenting)—I am unable to give my assent to the decision of the majority.

I concede that the chattel mortgage in question was not a mortgage upon a shifting stock of merchandise, but was a mortgage upon specific chattels described therein.

The cars were, however, known by the bank, as mortgagee, to be intended for sale to the general public as a part of the stock of the mortgagor. The bank's officers did not require anything more than that the mortgagee procure a release of the mortgage on any specific car when sold. The mortgage did not provide against sale or removal, and the bank's officers knew that they were being sold. Mr. Grondahl, an officer of the bank, testified that he so knew. He testified that the bank loaned the Mitchell Motor & Service Company a great deal of money and that the company was selling the particular cars that the bank had mortgages on. The officers of the mortgagee trusted Osmond, the manager

of the automobile company. Grondahl testified that the officers of the bank went up twice in a period of three or four years to see that the numbers were correct as described in their mortgages. The mortgage described the property as being located and kept at Pine and Summit, in the city of Seattle.

It seems to me that the plainest principle of equitable estoppel estops the mortgagee from recovering against this respondent who is an innocent purchaser for value.

It will not do to say that, because the mortgage was recorded, the automobile company could give respondent no better title than it had, and that it was respondent's duty to see what title the seller had. By its course of dealing the appellant, as mortgagee, put it in the power of the automobile company to defraud every purchaser of a car it procured. "Where one of two equally innocent persons must suffer, he should bear the burden whose conduct has induced the loss," is a principle of equity and common justice which we have asserted and applied in a great many cases.

If the decision stands, as respondent asserts, it will make it unsafe for any person to buy any article in any store in any town or city. If we hold that the bank is not estopped by its conduct, or did not waive the protection of the recording statute, and that Hardin should have investigated the records of King county before paying his money for the car, then no person can safely buy a sewing machine, a piano, or any other such valuable chattel without employing an attorney to search the records for him, or running the risk of having the article subsequently taken from him. It, as ssserted by respondent in this case, changes the recording statute into a sword instead of a shield. Many cases could be cited to sustain my position, but being so hopelessly in the minority, it would be profitless to do so and I forbear to cite them.

Regardless of precedents, in reason, equity and justice the judgment should be affirmed.

MACKINTOSH, J., concurs with HOLCOMB, J.

[No. 16768. Department Two. March 17, 1922.]

JULIETTA MORDEN, *Respondent*, v. JONATHAN MORDEN, *Appellant*.[1]

DIVORCE (8)—HUSBAND AND WIFE (106)—GROUNDS—INABILITY TO LIVE TOGETHER—SEPARATE MAINTENANCE. A divorce should not be granted on account of inability to live together, where the husband was at fault under flagrant circumstances making it against public policy, but the wife's plea for separate maintenance should be granted.

HUSBAND AND WIFE (111)—SEPARATE MAINTENANCE—AMOUNT OF AWARD AND RELIEF. In an action for separate maintenance, the court has power to award monthly payments of $75 out of earnings of $168, together with costs of suit and $100 attorney's fees.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 30, 1921, upon findings in favor of the plaintiff, in an action for separate maintenance, tried to the court. Affirmed.

E. C. Million, for appellant.

C. L. Parker, for respondent.

HOLCOMB, J.—Respondent sued for separate maintenance from appellant, and when appellant answered, he also cross-complained for divorce, alleging cruelty, consisting of nagging, fault-finding, and harsh and opprobrious epithets on the part of respondent to appellant.

At the trial, respondent consented that her complaint might be considered a complaint for divorce, should the court consider a divorce proper and necessary.

[1]Reported in 205 Pac. 377.

The court did not so consider, notwithstanding both parties testified that they could no longer live together as husband and wife, and respondent insisted that, by reason of the preference of appellant for another woman and his apparent attachment for the other woman, she could not longer live with him as his wife.

Appellant insists that, because it was incontrovertibly established that the parties can no longer live together as husband and wife, a divorce should have been granted to one or the other, or both, instead of the decree of separate maintenance which was made.

The evidence showed very conclusively that respondent was not at fault, and appellant was. The parties had lived together as husband and wife for thirty-three years. At the time of trial, respondent was fifty-seven years of age, and appellant fifty-two. They had raised a family of four children, who had reached maturity. Respondent had always been a kind, affectionate wife, and an excellent housewife. They had never had any trouble whatsoever until appellant was discovered paying attentions to the other woman whose meretricious disposition is proven by the circumstances that she went boldly to the home of these parties, accompanied by her husband, and begged respondent to free appellant by divorce, and her husband would free her (which he did), and she and appellant could then marry. Respondent refused. Respondent frequently tried to induce appellant to forsake the other woman.

A decree of divorce which would free the incontinent husband, under such flagrant circumstances, would be against public policy and abhorrent.

Respondent evidently hopes, as did the trial judge, that some time the recreant husband will return to his senses and his conjugal fealty. Under the system in force in this state, an innocent wife has such right.

It is true appellant has contributed by far the greater part of his earnings to his wife to be expended by her, up to the eve of trial, and quitclaimed all his right in and to the small real property to her. In all our separate maintenance actions the husband has not only been guilty of dereliction of duty towards the wife, but has furthermore failed or refused to contribute sufficiently for her maintenance. But divorce and equity courts have very wide and extensive powers over the parties and their property in such actions, and we think that the equity powers of the court extend to cover such a case as this, requiring appellant to live separate and apart from the wife and contribute $75 per month out of his monthly earnings of $168, pay the costs of suit, and $100 attorney's fees.

Decree affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 17030. Department Two. March 17, 1922.]

ZELMA LEVY *et al., as Administrators etc., Appellants,* v. BARNEY SIMON, *Respondent.*[1]

JURY (4)—RIGHT TO TRIAL BY JURY—ACCOUNTING. Where the pleadings show that the action involves a partnership and a large number of mutual accounts between the parties, undoubtedly requiring an accounting, a jury trial is properly denied.

WITNESSES (48-1) — TRANSACTIONS WITH DECEASED — WAIVER. Rem. Code, § 1211, excluding testimony of transactions with a deceased is waived, where administrators suing a surviving partner, introduced portions of the testimony of the defendant in a former proceeding to show contradictory statements; and they cannot object to defendant's introduction of the complete transcript for the purpose of reconciling his statements.

EVIDENCE (100)—SELF-SERVING DECLARATIONS—BY PERSONS SINCE DECEASED. In an action by administrators for an accounting, self-serving letters and bank statements of the deceased in his own interest are inadmissible.

PLEADINGS (174)—ISSUES—GENERAL DENIAL. In an action for a partnership accounting, under a general denial defendant may show that alleged moneys and goods furnished or forwarded were fully settled for or never furnished as claimed by plaintiff.

APPEAL (416)—REVIEW—FINDINGS—EQUITABLE ACTIONS. Findings in an action for an accounting depending upon the credibility of an eye witness whom the trial judge had the advantage of seeing must be considered as based on that which enlightened him on the issues only, and not on incompetent evidence unworthy of belief.

Appeal from a judgment of the superior court for King county, Oswald, J., entered May 14, 1921, upon findings in favor of the defendant, in an action to recover property belonging to the estate of a decedent, tried to the court. Affirmed.

Stephen J. Chadwick and *Walter B. Allen*, for appellants.

Arthur C. Bannon, for respondent.

[1]Reported in 205 Pac. 426.

HOLCOMB, J.—The complaint of appellant alleges:

That, during 1915, 1916, 1917 and 1918, the deceased, Louis Levy, furnished to respondent, at his instance and request, and made payments for respondent, and furnished and delivered to him goods, wares and merchandise of the reasonable value as shown in the attached items of account; that a list of such moneys and goods, with the dates on which they were furnished, is attached to the complaint, marked exhibit A, and made a part thereof, and that the interest on each item from the date thereof to the 10th day of March, 1920, at the rate of six per cent per annum, is also shown on the exhibit, in separate columns, making a total of principal of $118,315.22, and a total of interest on the items of account of $23,381.42, making a total indebtedness, including interest, of $141,696.64; that there are no credits or offsets against the amount alleged therein, other than the sum of $38,334.55, principal, and the sum of $9,295.58, interest at the rate of six per cent per annum upon each item thereof, figured from the date thereof to the 10th day of March, 1920, making a total of principal and interest of $47,640.12, to which respondent is entitled to credit. Appellant further alleged that, at the time of the death of Louis Levy, there was in his possession and under his control goods, wares and merchandise belonging to respondent, or in which he had an interest, which amounted to $27,093.47, and respondent has, by order of the superior court, been allowed a claim against the estate of Louis Levy for that sum, subject to any claim that may be due the estate from respondent, and appellants are willing to give credit upon the amount due the estate from respondent of the sum of $27,093.47, leaving a net balance due the estate, after allowing for that claim and offset, the sum of $66,973.04, for which

sum the plaintiffs ask judgment, with interest from March 10 until paid.

To the complaint is attached exhibits A and B, being the itemized list of indebtedness and credits, showing the date, nature, time paid, principal and interest. Exhibit A consists of 147 separate items of various amounts and dates, aggregating the amount claimed. Exhibit B consists of a list of nine items of various amounts and dates, aggregating the amount claimed to be proper credits in favor of respondent against the deceased.

To this complaint respondent answered, denying all of the allegations of paragraph 2, and specifically denying that the deceased furnished any of the items except as in the answer admitted, and specifically denying each item in exhibit A, except items 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 74, 83, 85, 86, 108, 113, 115 and 122, which he alleges were received as payments on account and denies all the other items in exhibit A. He also denies the allegations in paragraph 3 of the complaint, and every part thereof, in so far as appellants endeavored to set up an account from loose, unauthenticated memoranda, and alleges that, if any account is to be placed, it does not contain any substantial part of the credits due respondent. He denies that defendant had only $27,093.47 in goods in decedent's possession, and alleges that such goods were worth not less than $45,000, and that his total investment, including such goods with decedent, was $50,000.

By way of a first affirmative defense, respondent alleges that the case is not commenced within the time limited by law. For a further affirmative defense, he alleges that the sums admitted, and if there were any other sums of money sent by deceased to respondent, were forwarded as payments upon accounts of money

owing to respondent by decedent, and for goods, wares and merchandise sold and shipped by respondent to decedent, and prays that an accounting be had.

For a third affirmative defense, respondent pleads that the matters and things were before the court in probate cause No. 24596, and the evidence and exhibits are a part of the record upon appeal in that cause, and asks to have the action stayed until a final decision should be reached in that cause.

For a fourth affirmative defense and cross-complaint, respondent alleges that the deceased had in his possession $45,000 worth of goods belonging to respondent, and that an accounting should be had between them of moneys received by them from the sale of partnership assets.

To this answer the appellants joined issue by appropriate denials, whereupon respondent filed an amended answer, being the same as the foregoing answer down to the second affirmative defense, and in place of the second affirmative defense alleged that, in the probate cause of Louis Levy, it had been adjudged that the partnership had been commenced by deceased and respondent in the fall of 1918, and the items contained in exhibits A and B, after the last days of August, 1918, would be matters accruing subsequent to the commencement of the partnership. The third and fourth affirmative defenses allege matters of law. The fifth defense alleged that, if the sums set forth in exhibit A were forwarded at all, they were for moneys paid by respondent for the deceased. The sixth affirmative defense pleads that the evidence concerning matters in controversy is in the probate case on appeal to the supreme court, and asks to have the action stayed. The seventh affirmative defense alleges that Levy had $45,000 worth of goods belonging to respondent in his possession at his death, and that he sent Levy $3,500

after the partnership was formed, on about September 1, 1918.

Appellants filed a reply, denying the affirmative defenses and pleading the statute of limitations of the Territory of Alaska touching such matters, which were set out in the reply in full, and which showed that the statute of limitations upon accounts in Alaska is six years.

Appellants demanded, in writing, a trial by jury, and paid a jury fee into court. The case was set for trial as a jury case, and on the second day of May, 1921, came on for trial. The respondent objected to the case being tried by a jury, which objection was first overruled, and later, after an examination of the issues, and statements by counsel, the objection to trial by a jury was sustained, and the jury was discharged.

At the trial of the case, respondent obtained leave to, and again amended his answer, and by way of a fifth affirmative defense alleged that in July, 1913, he took into partnership the deceased, Louis Levy, at Fairbanks, Alaska; that, on about July 16, 1914, he sold out his interest in the partnership to the deceased, Louis Levy, for the sum of $40,000, taking in payment notes of Louis Levy, and from and after that date Louis Levy was the sole owner of the business conducted at Fairbanks; that thereafter respondent came to Seattle, where he purchased large stocks of merchandise and sold the same to Louis Levy at various times; that, from the time of the dissolution of the partnership and to the date of the commencement of the new partnership, respondent shipped goods and merchandise to the decedent, and paid bills for the use and benefit of the decedent in a sum greater than the amount sued upon herein; that a settlement was had between the parties hereto of all debts and liabilities existing be-

tween them, at Anchorage, Alaska, in the last days of August, or the first days of September, 1918; that all sums forwarded to respondent, if any be proved, were for payment on account, either for money owing respondent by way of the original sale, or for goods, wares and merchandise sold and shipped to Louis Levy; that, without waiving any of his legal rights heretofore set forth in his answer and affirmative defenses, respondent alleged that the court cannot try out and determine the issue except upon an accounting between the parties, and prayed that, in equity and good conscience, appellants be required to make full and complete and conclusive proof of their complaint by way of an accounting between the parties during the period through which it is claimed remittances were made to respondent.

The trial court entered findings of fact, (1) that decedent, Louis Levy, and respondent were in partnership prior to July 10, 1914, on which day respondent sold his interest to decedent for $40,000, taking therefor the notes of decedent; (2) that between July 10, 1914, and September 1st, 1918, respondent made sales and shipments of goods to decedent, and during that time decedent remitted to respondent sums of money as payment on account of the notes and the merchandise; (3) that, on or about September 1st, 1918, decedent and respondent made a complete settlement with each other of the mutual accounts and indebtedness, and that, by reason thereof, there is no necessity for an accounting as to such matters; (4) that thereafter respondent and Louis Levy entered into a new partnership; and (5) that all matters connected with the partnership existing at the time of the death of decedent, to wit, to September 1, 1918, had been eliminated by stipulation.

Upon these findings the court concluded, (1) that appellants' complaint should be dismissed with prejudice; and (2) that the cross-complaint of respondent as to matters connected with the co-partnership existing between the parties at the time of the death of Louis Levy should be dismissed without prejudice.

Judgment was entered in conformity with these findings and conclusions in favor of respondent, from which appeal has been taken to this court.

The first claim of error on the part of appellants is the denial of trial by jury.

When the complaint is taken and considered in connection with the amended answer of respondent, it is manifest that the pleadings show, (1) an action by the administrators of the estate of one partner against the surviving partner, thus showing a fiduciary relation; (2) that the interest of the surviving partner in the goods held by the decedent at the time of his death had been theretofore adjudicated to be presumptively a half interest (see *Simon v. Levy,* 114 Wash. 556, 195 Pac. 1025); (3) that decedent and respondent had a large number of mutual accounts.

We make these statements bearing in mind the fact that all items in controversy between the parties originating after the formation of the new partnership about September 1, 1918, had been eliminated by counsel for the respective parties by stipulation; but as the issues stood when the case went to trial, it was undoubtedly an action requiring an accounting. Such action is not triable by a jury. *Garey v. Pasco,* 89 Wash. 382, 154 Pac. 433.

The remaining errors, most of them, have reference to alleged errors in the admission or rejection of evidence.

The first of these refers to the admission of testimony of respondent in permitting his testimony given

on a former trial in the probate proceeding to be introduced in evidence upon cross-examination of witness Royse. Witness Royse was a court reporter, who took the testimony in the former trial referred to, although it is shown that he did not hear all of it. He was called by appellants and interrogated as to the testimony of respondent in that cause between the same parties as the parties to this action. Respondent then cross-examined the reporter as a witness as to the testimony of respondent, and introduced the complete transcript from the notes of the reporter, of his testimony on the previous trial.

The evident object of introducing in evidence the testimony of respondent at the former trial, so far as it was offered by appellants, was to show contradictory statements and admissions and declarations against interest. Having done so, appellants were in no position to object to the introduction of the remainder of his testimony for the purpose of harmonizing and reconciling all of his testimony, if possible. The statute, § 1211 Rem. Code (P. C. § 7722), excluding parties in interest from testifying as to transactions with decedents, may be waived as well as enforced. Hence, when the administrators offered in evidence the answers given by respondent as a witness, to certain questions asked him at the probate hearing, he would have been privileged to testify to any fact to which his questions and answers referred, and possibly the entire transaction. *Percy v. Miller,* 115 Wash. 440, 197 Pac. 638.

Other errors claimed relate to the exclusion of letters written by the deceased, and of declarations made by the deceased, and of bank statements of the deceased in a bank at Fairbanks, Alaska. None of the offered evidence was admissible. All of it was of the character of self-serving declarations. It is almost the universal

rule that the declarations of a decedent in favor of his own interest cannot be admitted, and only those declarations which are against his interest can be admitted. *Reese v. Murnan,* 5 Wash. 373, 31 Pac. 1027.

It is next contended that the admission of evidence showing payment by respondent of any or all accounts which may have been due the decedent was improper and incompetent, because payment was not alleged.

It was alleged that any moneys or merchandise furnished respondent by the decedent was furnished on account of moneys and accounts owing to respondent from the decedent, and that, in the summer of 1918, their mutual accounts were fully settled by them. In any event, evidence introduced showing that the goods and moneys forwarded by decedent, as alleged by appellants, were forwarded for goods and moneys owing by their decedent to respondent, was admissible under the general denial as proving that the alleged sales and loans were never made as alleged in the complaint, and were not in fact sales nor loans. *Howatt v. Clark,* 112 Wash. 137, 192 Pac. 7.

Appellants allege error in the findings of fact and conclusions of law, and devote much space to their contentions that the evidence did not preponderate with the court's findings, but, on the contrary, preponderated against them.

There was some evidence on the part of a certain witness, Weinberg, whose credibility is vehemently attacked, that he saw and heard certain things in the latter part of August, 1918, in Fairbanks, Alaska, between the deceased and the respondent, which showed that they had arrived at a settlement and money was paid to consummate it. The trial court had the advantage of seeing and hearing the witnesses testify, and judging of their demeanor, which we have not.

Unless we can see that the admission or exclusion of evidence led to some injustice to the losing party, we generally do not, and should not, reverse the judgment of the trial court. The evidence was competent, being the evidence of an eyewitness, and we must believe that the trial judge, who was the sole trier of the facts, refused to consider testimony which appellants insist was incompetent or unworthy of belief, and considered that which enlightened him on the issues only. A trial judge is generally able to separate the grain from the chaff, and decide a case upon such testimony alone as is proper to be considered.

We must concede that this case is one of great importance to the heirs and representatives of the deceased, and that the lips of Louis Levy, being closed, competent evidence was very hard to obtain. In a brief summing up, in passing upon appellants' motion for a new trial, the trial court made some observations which convince us that he very carefully considered the evidence offered, and as he stated, "viewed the probabilities in the light of the peculiar situation that the deceased and respondent were brothers between whom a very intimate relationship existed, and very great confidence one in the other." The trial court also conceded that the witness Weinberg was the only witness to the transaction constituting a settlement between the deceased and respondent in Alaska, and also that it was necessary to show that the parties not only agreed to a settlement, but that they made a settlement by paying the money; and the trial court considered, and so stated, that the testimony of Weinberg was corroborated in all particulars as to the settlement so agreed upon. Bear in mind that the partnership which had formerly existed between Louis Levy and his brother, the respondent, had been ended several years before; that Louis Levy was

owing, upon the dissolution of that partnership, $40,000 to respondent, his brother, for the purchase money of respondent's interest in that business, and it was shown that a great deal of merchandise was shipped from Seattle to the deceased in Alaska after the partnership was dissolved and prior to September 1, 1918. While a book account was introduced on behalf of appellants showing the items set forth in their exhibit A, to some extent at least, none of these items show upon what account, or for what purpose or application, any of the checks or drafts sent to Barney Simon were made. We cannot presume that the moneys sent by check and draft by Louis Levy to respondent were in the nature of loans, when the evidence shows conclusively that a great deal of merchandise was being shipped to him during all the time, and that he also owed respondent for the purchase price of his interest in the former partnership.

We are unable, therefore, to conclude that the evidence preponderates against the findings of the trial court. Such being the case, the judgment must be, and is, affirmed.

Parker, C. J., Main, Mackintosh, and Hovey, JJ., concur.

[No. 16961. Department Two. March 17, 1922.]

CARRIE A. OLIVER *et al., Respondents,* v. E. R. TAYLOR *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS (379, 383)—USE OF STREETS—MUTUAL RIGHTS AT INTERSECTIONS—CONTRIBUTORY NEGLIGENCE. The driver of a truck first entering a street intersection, and colliding with a Ford, is nevertheless guilty of contributory negligence, where he saw the Ford approaching from the right, at a high rate of speed, in time to have stopped, but veered to the left without slackening his speed, and there would have been no collision if he had either stopped or continued his course across the street; the right of way not being absolute but relative.

NEW TRIAL (16)—GROUNDS—MISCONDUCT OF JURY—MANNER OF ARRIVING AT VERDICT. A new trial on the ground of misconduct in a quotient verdict is properly denied where the jurors made oath that there was no agreement to abide by the quotient, and it appears that the verdict rendered was not a quotient of the sums each juror voted for.

TRIAL (50)—CONDUCT OF COUNSEL—RETALIATORY REMARKS. Error cannot be predicated upon argument of counsel responsive to statements made by counsel, which the jury were instructed to disregard.

MUNICIPAL CORPORATIONS (380, 388)—USE OF STREETS—ORDINANCES—EVIDENCE. It is not error to admit an ordinance relative to the duty of automobile drivers simultaneously reaching street intersections, where the speed of one furthest away was such as to constitute simultaneous approach.

DAMAGES (80)—EXCESSIVE DAMAGES—INJURY TO PERSON. A verdict for $4,000 for personal injuries sustained in an automobile collision is not excessive, where plaintiff was severely bruised, bones were broken, her vision permanently impaired, she was long in a hospital and will require medical attention for the rest of her life.

APPEAL (465)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT. Error cannot be predicated upon failure of the instructions to limit the recovery to the amount claimed in the complaint where the verdict was within the sum.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 21, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

[1]Reported in 205 Pac. 746.

Roberts & Skeel and *N. A. Pearson,* for appellants.
Cooley, Horan & Mulvihill, for respondents.

Hovey, J.—This is an action for personal injuries sustained by respondent Carrie A. Oliver, from a truck belonging to appellants. The case was tried to a jury, which rendered a verdict for $4,000, and from the judgment upon this verdict, this appeal is prosecuted.

The first question raised is the sufficiency of the testimony to sustain any recovery whatever.

The accident occurred in the city of Everett, at the intersection of California and Lombard streets. California street runs east and west and is fifty-two feet wide between curbs. Lombard street runs north and south and is forty feet between the curbs. There is a sewer manhole in the center of the intersection of these streets. Counsel have supplied the court with an excellent map, drawn on a large scale. The point on the north side of California street, about ten feet from the east line of the intersection and near the curb, is indicated by the letter "B." A point about five feet south of the manhole in the center of the intersection is indicated by the letter "E." The truck belonging to appellants weighed 4,100 pounds and was operated by a driver eighteen years of age, who had with him in the seat two young ladies. He was traveling west on California street at a speed estimated by him at twelve miles per hour. At point "E" he could, and did, see across on Lombard street for a distance of sixty feet from the intersection, where a Ford car, operated by one Frolich, was approaching the intersection at a high rate of speed. From the point "B," the driver of the truck veered to his left, and, according to the witnesses for the plaintiff, pursued a straight course diagonally across the intersection, without slackening speed, to the point "E". The

Ford continued in a straight course to the south, and struck the rear end of the truck on the latter's right hind wheel. The rear of the truck then whirled to its left and its end gate overlapped the sidewalk at the southwest corner of the intersection, and struck the plaintiff, who had just crossed the street from the north to the south side of California street, and who was in view of the driver of the truck from the time she reached the center of the street in crossing it.

There is much less controversy in the testimony than is usual in cases of this kind. The driver of the truck admits that he pursued substantially the course claimed by the plaintiff, and that, to avoid the Ford, he commenced angling before he ever entered the intersection; he further says that he speeded up the truck towards the last to avoid the collision. He admits that he made no effort to stop the truck, although he testified, in one place he could stop it at this speed in the distance of ten feet. This statement he afterwards qualified with respect to a slippery pavement. It is undisputed that the pavement was slippery and that it was a rainy afternoon.

The main contention of appellant seems to be that the truck was first in the intersection and had the right of way, and that the driver did all that he could to avoid the injury. The evidence indicates that the primary negligence was that of the driver of the automobile, but we think the jury were fully justified in concluding that the driver of the truck was also negligent. There was testimony on behalf of plaintiff that, if the truck had proceeded straight across the intersection, there would have been no collision, and it is plainly apparent that the driver of the truck could have avoided the injury by stopping at any time before he reached the center of the intersection. The fact that the truck was in the intersection first did not give

it the right to proceed without using reasonable care; there was also the other duty upon the driver of observing traffic approaching from the right. As we said in *Greater Motors Corporation v. Metropolitan Taxi Co.*, 115 Wash. 451, 197 Pac. 327:

"The right of an automobile driver who has the right of way is not exclusive but is at all times relative and subject to the common law doctrine that the right must be so used as not to injure another."

Whether the driver was negligent in this case was a question for the jury.

The second ground argued is irregularity and misconduct of the jury. The appellants, on their motion for new trial, presented affidavits of several jurors to the effect that a quotient verdict was rendered under an agreement to abide by the same in advance. Opposed to these were the affidavits from the same jurors to the effect that there was no agreement in advance to abide with the quotient verdict, and that any such statements contained in their previous affidavits were without their knowledge. It is also indicated by the opposing affidavits that the verdict rendered is not the quotient of the sums each juror was willing to award. We think the trial court did not abuse its discretion in refusing a new trial upon this ground.

Error is also predicated upon the remarks of counsel for the respondent in his address to the jury, but the remarks complained of appear to have been invited by, and responsive to, statements made by counsel for the appellant, and the jury were instructed to disregard them.

Error is claimed because an ordinance of the city of Everett was introduced relative to the duty of the driver of an automobile to give way to traffic approaching from the right where two vehicles simul-

taneously approach a street intersection. Because of the greater speed of the automobile in this case, we are not prepared to say that it would not be so close to the intersection, at the time that the truck reached its side of the intersection, as not to constitute simultaneous approach.

Appellant contends that the damages allowed in this cause are excessive. The plaintiff was thrown to the pavement by the blow of the truck and did not recover consciousness until the next day. She was in the hospital for several weeks, and under the doctor's immediate care considerably longer. She suffered a permanent injury to one of her eyes which will interfere with her vision. She was severely bruised, had two fractured ribs, and a fracture to a bone in the head. As a result of the injury, she developed neuritis in her right forearm and in the left side of her chest, and her doctor testified that she would require medical attention for the rest of her life. Her bills for medical treatment and hospital service up to the time of trial were in excess of $300, and we are not prepared to say that the balance of the recovery is unreasonable, when we consider the injury sustained.

Error is also predicated on the failure of the trial court to instruct the jury that the limit of recovery would be $5,000, the amount demanded in the complaint. As the recovery was within this sum, this error does not seem to be material.

We have investigated the other errors assigned as to the introduction of testimony and the instructions, and so far as they are not covered by what we have already said, we do not deem them of moment.

Judgment affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16720. *En Banc.* March 17, 1922.]

MIKE R. PLASTINO, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

STREET RAILWAYS (20, 29)—CONTRIBUTORY NEGLIGENCE—DRIVERS OF VEHICLES—QUESTION FOR JURY. Whether the driver of an automobile, struck by a street car at an intersection, was guilty of contributory negligence in not seeing the approaching street car, of which he had an unobstructed view while waiting for another street car to pass, is a question for the jury, where the street car, without any signal or warning, was approaching at such an excessive speed that there is room for an honest difference of opinion as to whether a reasonably prudent man would have concluded that there was no approaching car near enough to hit him before he crossed the tracks.

SAME (34)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE. An instruction as to the duty of an automobile driver in crossing street car tracks is not erroneous or misleading in stating that failure to look and listen is not necessarily contributory negligence.

ELECTION OF REMEDIES (5)—VALIDITY AND FINALITY—INEFFECTIVENESS OF REMEDY. The filing of a claim for compensation under the workmen's compensation act cannot be said to be an election of remedies, precluding a telephone operator, struck by a city street car while crossing the track, from suing the city for his injuries, where there was no showing that he had received or was entitled to compensation, or that the telephone company was subject to the act.

NEW TRIAL (11)—GROUNDS—ARGUMENT OF COUNSEL. In an action against a city for personal injuries sustained in a collision with a city street car, it is not an abuse of discretion to refuse a new trial on the ground of improper argument to the effect that the city general fund would not be liable for any recovery by plaintiff, where the city did not ask for any instruction to the jury to disregard the remarks, and the court made it clear that parties suggested as liable were not interested in the case.

MACKINTOSH, BRIDGES, and HOVEY, JJ., dissent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 2, 1921, upon the verdict of a jury rendered in favor of the plaintiff,

[1]Reported in 205 Pac. 404.

in an action for personal injuries sustained in a collision between an automobile and a street car. Affirmed.

Walter F. Meier and *Frank S. Griffith*, for appellant.

Walter S. Fulton and *Tucker & Hyland*, for respondent.

PARKER, C. J.—The plaintiff, Plastino, commenced this action in the superior court for King county, seeking recovery from the defendant city of damages which he claims to have suffered as the result of the negligent operation of one of the city's street cars. A trial upon the merits resulted in a verdict awarding to Plastino recovery in the sum of $7,000. The city, by appropriate motions timely made during and following the trial, challenged the sufficiency of the evidence to entitle Plastino to any recovery, and also moved in the alternative for a new trial. The trial court denied the city's motions challenging the sufficiency of the evidence to entitle Plastino to any recovery; and also denied the city's motion for a new trial, upon condition that Plastino consent to a reduction of the award to $6,400. He having elected to take an award so reduced, rather than suffer a new trial, judgment was rendered accordingly; from which the city has appealed to this court.

The first and principal contention here made in behalf of the city is that the trial court erred in overruling its motions for an instructed verdict and for judgment notwithstanding the verdict; that is, that the trial court erred in its refusal to decide, as a matter of law, that Plastino was not entitled to any recovery. The argument of counsel for the city upon this branch of the case is addressed almost wholly to the question of contributory negligence on the part of

Plastino. He was injured by one of the city's street cars coming into collision with an automobile he was driving, while crossing the intersection of Twenty-fourth avenue northwest and west Sixty-first street, in the city of Seattle. These streets cross at right angles; Sixty-first street runs east and west; Twenty-fourth avenue runs north and south and has two street car tracks upon it. The north-bound cars run upon the east track, and the south-bound cars upon the west track. Twenty-fourth avenue is paved to the width of sixty feet between the curbs of the sidewalks.

At the hour of about two o'clock in the afternoon of the day of the accident, Plastino drove west along Sixty-first street, approaching Twenty-fourth avenue. When he arrived at about the east line of the pavement of Twenty-fourth avenue, he stopped to await the passing of a north-bound street car upon the east track, which car was about to cross Sixty-first street. He waited there for a moment until he considered that the street car had proceeded a sufficient distance across the intersection so that he could proceed, when he started on west along Sixty-first street, passing immediately behind and within a few feet of the north-bound street car. When he arrived upon the west track, his automobile was struck broadside by a rapidly moving south-bound street car upon the west track, causing his injury. The jury might well have believed that the speed of the south-bound street car was thirty miles, or more, per hour, the lawful speed being not to exceed twenty miles per hour. The impact was so violent and the speed of the street car so great, that Plastino and his automobile were carried along upon the front end of the street car a distance estimated by different witnesses at from 125 to 160 feet.

Just as Plastino was starting his machine to cross the pavement and street car tracks behind the north-bound street car, he looked north to see if there were any cars approaching from that direction upon the west track and did not see any, according to his testimony. It is, it must be conceded, somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction; since his view was unobstructed for a long distance to the north past beyond the north-bound street car, and the fast-moving south-bound street car was then approaching from the north upon the west track about a block away; but we think the jury might well have believed from the evidence that Plastino did not become conscious of the approach of any street car from the north upon the west-bound track within any such distance as would lead a reasonably prudent person to believe that any car approaching from that direction would reach his line of travel in crossing the west track before he would arrive upon the west track; that is, we think there is room for honest difference of opinion as to whether or not Plastino was warranted in then assuming that no car would reach his line of travel upon the west track from the north and come into collision with his automobile, should he proceed on his way. It is not so much a mere question of Plastino's seeing the south-bound car at a more or less comparatively long distance to the north; but it is a question of his using reasonable caution to look and determine whether or not any street car was approaching from the north within such a distance as to make it dangerous for him to proceed across the west track. While the testimony of the witnesses is in conflict as to whether the motorman on the south-bound car timely rang his bell on approaching Sixty-first street, we think the jury were warranted in be-

lieving that no such signal was timely given. Our recent decisions in *Coons v. Olympia Light & Power Co.*, 111 Wash. 677, 191 Pac. 769; *Johnson v. Seattle*, 113 Wash. 487, 194 Pac. 417; *Nabours v. Seattle*, 113 Wash. 557, 194 Pac. 800; and *Goldsby v. Seattle*, 115 Wash. 566, 197 Pac. 787, it seems to us are decisive in favor of Plastino upon the question of whether or not he was, as a matter of law, guilty of contributory negligence.

Our decision in *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058, particularly relied upon by counsel for the city, does seem to furnish some argument in support of a contrary holding. That case involved the care to be exercised by a pedestrian crossing a street intersection over street car tracks. A pedestrian has at least some greater degree of opportunity to protect himself than one driving an automobile, by reason of the fact that he has a somewhat larger degree of control over his movements. We note that the pedestrian injured in that case was passing behind a standing street car in front of an on-coming car on another track; and being only a pedestrian he could have stopped, even after passing behind the first car; and no doubt would have then stopped had he made proper observation of the on-coming car on the other track. This, it would seem, furnishes some ground for distinguishing that case from this. However that may be, we think the later decisions of this court, above cited, are controlling here. We conclude that, in view of the speed of the south-bound car, the want of timely signal of its approach from the north, and what Plastino did under the circumstances, as the jury was warranted in viewing them, it should not be decided, as a matter of law, that the city was free from negligence, or that Plastino was guilty of contributory negligence.

It is contended in the city's behalf that the trial court gave to the jury two instructions which were so conflicting and confusing as to be prejudicial to the rights of the city. For the purpose of informing the jury as to the respective rights and duties of the operator of a street car and the operator of an automobile at a street crossing, under an ordinance of the city, the court gave its 14th instruction as follows:

"I instruct you as a matter of law that it is the duty of the driver of a vehicle to be constantly on the lookout to avoid being hit by street cars; that is, it is the duty of the driver to keep out of the way of the street car, and if you find from the evidence in this case that the plaintiff was not paying heed or was not giving the right of way, or that he was violating any of the provisions of the ordinance to which I called your attention, then he would be guilty of negligence."

This was followed by the court's 15th instruction, reading as follows:

"But the failure to look and listen at a street crossing before crossing the street does not constitute negligence as a matter of law."

At first thought it seems a little difficult to harmonize these two instructions; but we think they are not so inconsistent as to have misled or confused the jury to the prejudice of the city. Indeed, it is a little difficult to see other than that the 14th instruction was somewhat more favorable to the city than it was entitled to; since to give all of its language full force and effect would seem to leave no degree of care imposed upon the operator of a street car. The 15th instruction, we think, is the settled law in the light of our repeated holdings. We must remember that this was a collision between a street car and an automobile, and not between an ordinary railroad train and an automobile. More than that, it occurred within a street intersection,

where, manifestly, the degree of care to be exercised by the respective operators of the street car and the automobile was substantially equally reciprocal, though the street car may have had the right of way. We think the law of the situation here in question is well stated by Judge Fullerton in the late case of *Johnson v. Seattle*, 113 Wash. 487, 194 Pac. 417, as follows:

"Contrary to the rule applicable to ordinary railroads, we have held that it is not negligence in itself to fail to stop, look and listen before crossing a street car track. This, of course, does not mean that a person so crossing may act blindly, without giving any heed to his own safety; it means simply that the rule is not one of uniform application to such a situation; that a person is not to be charged with negligence from the fact alone that he did not stop, look and listen. If the conditions are such that it would be the duty of an ordinarily prudent person to stop, look and listen before crossing the track, then the person crossing must do so, else be charged with negligence for not so doing. Stated in another way, the omission of the duty is but a fact to be weighed with all other facts and circumstances surrounding the case in determining the question of negligence or contributory negligence."

We think the giving of these two instructions was not error prejudicial to the city's rights in the trial of the case.

Some contention is made that the trial court erred in refusing to give certain instructions requested by counsel for the city to be given. We think it sufficient to say that the instructions so requested to be given were covered in substance by others given by the court, which were fully as favorable to the city's contentions as the ones refused to be given, and that, therefore, no prejudicial error was committed in the refusal complained of.

The city pleaded as an affirmative defense, in substance, that Plastino, when he was injured, was then

acting in the course of his employment as a lineman of the Pacific Telephone & Telegraph Company, and that he had, previous to the commencement of this action, filed a claim with the industrial insurance commission, claiming compensation against the industrial insurance fund for such injury. This was admitted in Plastino's answer, in so far as his being so employed and the mere filing of his claim with the industrial insurance commission are concerned. There is nothing else in the record touching this question, other than his testimony showing that he was at the time on his way to disconnect a telephone; and, of course, the fact that he was injured by the city, a third party, while away from the plant of his employer. It is contended and briefly argued, in behalf of the city, that this action on the part of Plastino was an election by him to take under the industrial insurance act, such as to preclude him from recovering in this common law action. The trouble with our dealing with this question is that the record before us is not such as to enable us to determine whether or not Plastino had any right of election such as it is claimed he made by the filing of his claim with the industrial insurance commission. There is nothing in the record to show that he ever followed up his claim against the insurance fund, or that his claim was ever considered or allowed by the industrial insurance commission; nor is there anything in the record lending support to the city's contention, upon this affirmative defense, that Plastino's employer was under the industrial insurance law of this state as to compensation to its injured employees. It may be said that Plastino's employer was engaged in both intrastate and interstate commerce to such an extent that it was not possible to render "clearly separable and distinguishable" its pay roll of workmen engaged in each of

such classes of work. This would exempt his employer from the operation of our industrial insurance law, and make his only available remedy a common law action against the city, such as we have here. Laws of 1919, ch. 67, p. 136, § 3 (Rem. Comp. Stat., § 7695); *State v. Postal Telegraph-Cable Co.*, 101 Wash. 630, 172 Pac. 902. This record does not enable us to decide that there was any remedy available to Plastino other than by this action; hence he made no binding election when he filed his claim with the commission.

It is contended in behalf of the city that Mr. Tucker, of counsel for Plastino, while making his argument before the jury, was guilty of misconduct in the use of certain language to the prejudice of the city. All that we have in the record touching this contention is the following:

"Mr. Tucker: . . . Counsel knows that any judgment that is rendered will not be paid out of the city treasury, but will be paid out of the Stone & Webster bonds. Mr. Griffith: If the court please, I think counsel is just a little out of propriety when he talks about that. That is improper conduct and improper argument. The Court: What was his remark? Mr. Griffith: His remarks were something about the bonds of Stone & Webster. It is rather stretching the argument a little. The Court: Well, I guess Stone & Webster are not interested in this matter now, Mr. Tucker. Mr. Tucker: Well, the only thing I wanted to say—I don't think I was in error about it, but anyway whatever judgment we get is payable out of the public utilities. Counsel will not contend that if we get a judgment it is payable out of the general fund—"

It must be conceded that some impropriety on the part of Mr. Tucker is suggested by this quoted portion of the record. We are convinced, however, that his conduct was not of such a prejudicial nature against the city as to call for a new trial of this case. In the

first place, the record does not disclose to us what was, or could have been, meant by Mr. Tucker by the use of the term "Stone & Webster bonds," except possibly that any judgment which might be recovered by Plastino would not be payable out of the general funds of the city—that is, by the taxpayers of the city—but would be payable out of some special fund, apparently the proceeds of the operation of the city's street car system as an independent business. As to whether this was or was not prejudicial to the city, was apparent to the trial court more clearly than it is made to us by this cold record. We note that counsel for the city did not ask any instruction from the court to the jury to disregard the observations of Mr. Tucker. Nevertheless, the court's remark, "Well, I guess Stone & Webster are not interested in this matter," seems to us to have been sufficient under the circumstances. We conclude that the trial court did not abuse its discretion in holding that this was not cause for a new trial.

Two other contentions are made and very briefly argued: (1) That the wife of Plastino, present at the trial, was guilty of such misconduct as to prejudice the rights of the city in the trial; and (2) that the verdict was excessive, as being prompted by passion and prejudice on the part of the jury. We think it sufficient to say that we have carefully examined both of these contentions and are quite satisfied that there was no abuse of discretion on the part of the trial court in refusing to grant a new trial for either of such reasons.

The judgment is affirmed.

FULLERTON, MAIN, HOLCOMB, and MITCHELL, JJ., concur.

MACKINTOSH, J. (dissenting)—The opinion of the majority says: "Just as Plastino was starting his machine to cross the pavement and street car tracks be-

hind the north-bound street car, he looked north to see if there were any cars approaching from that direction upon the west track and did not see any, according to his testimony. It is, it must be conceded, somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction; since his view was unobstructed for a long distance to the north past beyond the north-bound street car, and the fast moving south-bound street car was then approaching from the north upon the west track about a block away." The only objection I have to this statement is that, under the evidence, it is not "somewhat difficult to arrive at the conclusion that he did not see any car approaching from that direction," but that it is impossible to reach such a conclusion. He had stopped before attempting to cross a street one hundred feet in width, upon which he had an unobstructed view for several hundred feet, and the testimony is that there was no other traffic on the street except the street car north-bound, and yet he says that, although he looked, he did not see the south-bound car. I cannot understand how his conduct can be other than negligent, as a matter of law. The only conclusion I can arrive at from this testimony is that he did not look, and under such circumstances as here surrounded him, he must look. I therefore dissent from this opinion, and believe that judgment should have been entered for the appellant.

BRIDGES and HOVEY, JJ., concur with MACKINTOSH, J.

[No. 16880. Department One. March 17, 1922.]

VIOLET V. BALL, *Respondent*, v. C. B. BUSSELL, *Appellant*.[1]

JUDGMENTS (274)—ACTIONS ON—LIMITATIONS. Under Rem. Code, §§ 459, 460, providing that a judgment shall cease to be a lien and that no action thereon shall extend the duration of the "judgment, claim or demand" beyond six years from the date of the judgment, in a second action on a liability arising since the enactment of the statute (in 1897) the duration of the judgment must be limited to six years from the date of the former judgment.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 24, 1921, upon findings in favor of the plaintiff, in an action on a judgment, tried to the court. Reversed.

G. E. de Steiguer and *E. P. Whiting*, for appellant.

Geo. B. Cole and *John Wesley Dolby*, for respondent.

PARKER, C. J.—This is an appeal from a judgment rendered by the superior court for King county upon a judgment theretofore rendered by that court.

The controlling facts are not controverted and may be summarized from the record before us as follows: On February 6, and March 7, 1913, respectively, at Seattle, this appellant, C. B. Bussell for value received, executed and delivered two promissory notes; the first to respondent, Violet V. Ball, for the sum of $2,000, payable ninety days after date, and the second to Ella E. Townsend for the sum of $700, payable ninety days after date. In June, 1914, these notes having both matured and remaining wholly unpaid, respondent, remaining the owner and holder of the first note and having then become the owner and holder of the second note, commenced an action in the superior court for King county against appellant, seek-

[1]Reported in 205 Pac. 423.

ing recovery of the amounts of principal and interest due upon both notes. Such proceedings were regularly had in that action that on March 31, 1915, a judgment was duly rendered therein awarding to respondent recovery upon the notes against appellant. In July, 1920, respondent commenced this action in the superior court for King county, seeking recovery of a judgment against appellant upon that judgment, alleging that it remained wholly unsatisfied. A trial upon the merits resulted in findings and a judgment rendered on March 23, 1921, awarding to respondent judgment against appellant as prayed for. While this judgment was rested wholly upon the prior judgment, it is in the usual form of a personal money judgment and contains no language limiting the duration of its life. So, upon its face, it purports to be a judgment the life of which will be for the statutory period of six years from the date of its rendition.

It is contended in appellant's behalf that the judgment is erroneous, to his prejudice, in that it fails in terms to limit its life to the period of six years following March 31, 1915, the date of the rendering of the judgment upon which it is rested. We feel constrained to hold that this contention must be sustained. In the year 1897, long before the execution of the notes upon which the first judgment was rendered and the rendering of that judgment, the legislature passed an act the title and body of which, in so far as we need here notice its language, read as follows:

"An Act relating to the duration of judgments and repealing sections 462 and 463, volume 2, Hill's Code of Washington.

"*Be it enacted by the Legislature of the State of Washington:*

"Section 1. After the expiration of six years from the rendition of any judgment it shall cease to be a

lien or charge against the estate or person of the judgment debtor.

"Sec. 2. No suit, action, or other proceedings shall ever be had on any judgment rendered in the State of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment. . . .

"Sec. 4. Sections 462 and 463 of volume 2, Hill's Code of Washington, relating to a renewal of judgments, are hereby repealed." [Laws of 1897, pp. 52 and 53; Rem. Code, §§ 459 and 460; P. C. §§ 8163 and 8164.]

The sections of Hill's Code so repealed, relating to the revival of judgments, were then the whole of our statute law upon that subject. Those sections, it is true, are embodied by the compiler in §§ 462 and 463, Rem. Code, but manifestly merely for the purpose of reference, in so far as they may have remained in force and applicable to the revival of judgments rendered, or upon contracts entered into, before the enactment of the law of 1897. But the facts above noticed render it plain that those sections have no application to respondent's claim of recovery involved in this case; since such claim had its inception in the notes executed long after the passage of the law of 1897. *Catton v. Reehling,* 78 Wash. 187, 138 Pac. 669. It seems plain to us, not only that there cannot be any revival of the judgment of March 31, 1915, as such, but also that there cannot be any revival or continuation of the life of the cause of action it evidences, beyond "six years from the date of the entry" of that judgment. This we think is rendered plain by the use of the words "claim or demand" in addition to the word "judgment" in § 2 of the law of 1897; meaning,

we think, not only the judgment as such, but also the "claim or demand" upon which it is rested.

Some contention is made in respondent's behalf that, since the title of the law of 1897 in terms mentions the subject-matter of the act as "relating to the duration of judgments," the language of the body of the act should be considered restricted accordingly, and held to mean that it is only the original judgment, as such, that cannot be revived so as to continue its life more than six years following the date of its rendition. If the language of the body of the law seemed to us of doubtful meaning, we might look to its title for light as to its meaning, but we think there is no occasion to do so in this case.

This court has held that an action may be maintained in our courts to secure the rendering of a judgment upon a prior judgment, during the life of such prior judgment (*Citizens' National Bank of Crawfordsville v. Lucas,* 26 Wash. 417, 67 Pac. 252, 90 Am. St. 748, 56 L. R. A. 812); but we think that does not argue that the judgment which may be rendered in the second or successive actions shall have a life beyond that of the original judgment. To so hold would be to render the law of 1897 (Rem. Code, §§ 459 and 460) of no force, in so far as it limits the life of the "claim or demand" upon which a judgment is rendered, as well as the life of the judgment as such, to "six years from the date of the entry" of the judgment. The reasoning of our decision in *Burman v. Douglas,* 78 Wash. 394, 139 Pac. 41, we think leads to this conclusion. The following decisions of this court are of interest in connection with our present inquiry, and not out of harmony with the views herein expressed: *Meikle v. Cloquet,* 44 Wash. 513, 87 Pac. 841; *Lilly-Brackett Co. v. Sonnemann,* 50 Wash. 487, 97 Pac. 505;

Seattle Brewing & Malting Co. v. Donofrio, 59 Wash. 98, 109 Pac. 335; *Johnson v. Great Northern Lumber Co.,* 85 Wash. 16, 147 Pac. 641.

It so happens that the life of the original judgment here in question expired on March 31, 1921, which, it will be noticed, was only eight days following the entry on March 23, 1921, of the judgment here upon appeal. It follows from our view of the law, as above expressed, that at this time both the original judgment and the judgment which is here upon appeal must be held to be no longer a charge against the person or estate of appellant. If six years following the entry of the original judgment had not at this time expired, we would remand the case to the superior court with directions to embody in the judgment here on appeal appropriate language specifically limiting its life to the same period as that of the life of the original judgment, to wit, six years following March 31, 1915; which period would end March 31, 1921. But, there not being at this time any necessity for such a direction, we simply conclude that the judgment appealed from must now be held to be of no force or effect following March 31, 1921, and that to that extent it should be set aside and held for naught.

It is so ordered.

Appellant will recover his costs upon this appeal.

MITCHELL, FULLERTON, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 16829. Department Two. March 18, 1922.]

ELLA F. SMITH, *Respondent*, v. GEORGIA PEARL PONTIUS, *as Executrix etc., Appellant*.[1]

INSANE PERSONS (14)—PARENT AND CHILD (4-1)—SUPPORT OF CHILD. A divorced husband is not liable to the wife for expenses in maintaining an insane child in a private asylum, where the child had been regularly committed to a state institution, and was paroled on the request of the mother who agreed to pay the expense of maintaining the child, and it does not appear that the child received any better treatment or that the removal was reasonably necessary for the welfare of the child.

Appeal from a judgment of the superior court for King county, Sessions, J., entered June 14, 1921, upon findings in favor of the plaintiff, in an action for money paid, tried to the court. Reversed.

Burkheimer & Burkheimer, for appellant.

Tucker & Hyland (*Ford Q. Elvidge*, of counsel), for respondent.

MAIN, J.—The plaintiff brought this action against Frank A. Pontius for the purpose of recovering a large sum of money claimed to have been expended by her in support and maintenance of the insane son of the parties. The trial resulted in findings of fact and conclusions of law sustaining the plaintiff's right to recover, and a judgment against the defendant in the sum of $4,539.47. From this judgment he appeals. After the action was instituted and before it was tried, Frank A. Pontius died, and the executrix of his last will and testament was substituted as party. In the interest of clearness and facility of expression, when the term appellant is here used it will be understood to refer to the original defendant, Frank A. Pontius, deceased.

[1]Reported in 205 Pac. 381.

In the year 1877, the appellant and respondent were married, and as a result thereof two children were born, one a boy, Frank A. Pontius, Jr., and the other a girl. On the 22d day of June, 1896, the parties were divorced and the custody of Frank A. Pontius, Jr., in the decree was awarded to his father, the appellant, and the custody of the daughter was given to the mother, the respondent. Subsequent to this time both parties remarried.

On September 19, 1904, and approximately one month after he attained his majority, Frank A. Pontius, Jr., was adjudged insane and committed to the asylum at Steilacoom. After the divorce and prior to his commitment, he had lived part of the time with the father and part of the time with his mother, but probably a greater portion of it with the father. On February 25, 1909, the respondent filed a petition in the insanity proceeding, asking that her son be paroled, and as a result thereof an order was entered on the same day permitting a parole. After this the respondent, with the exception of a very brief period, caused him to be kept in private sanitariums and either paid the expense incident thereto or obligated herself for the same. Sometime during the year 1918, the respondent being no longer financially able to maintain the son in private sanitariums, he was returned to the asylum to which he had been committed, and was there at the time of the trial.

The controlling question is whether the appellant is liable for any portion of the funds expended by the respondent, or which she obligated herself to expend, for the support and maintenance of the son after he was paroled and prior to the time that he was returned to the asylum. As a fact, it will be assumed that he was insane prior to the time that he attained his

majority and that his insanity was continuous up to the time he was committed. As a matter of law, it will be assumed, but not decided, that the parents' liability for the support and maintenance of an adult son who became insane during his minority is the same as the liability of the parents to support a minor child.

If the appellant is liable, it can only be upon the ground that the money expended by the respondent for the son in private sanitariums was reasonably necessary for his support and maintenance. In the petition for the parole, the respondent recited that, if it were granted, she would remove the insane person to a suitable private sanitarium and would cause him to be maintained there without expense to the state. The order granting the parole recites that the insane person be placed in the custody of the respondent, the petitioner in that proceeding, and that he be placed, without expense to the state, in a private sanitarium. When Frank A. Pontius, Jr., was originally committed to the asylum it was at the instance of his father, the appellant. The evidence shows that the appellant was averse to having him taken from the asylum where he was committed at the time the order permitting the parole was entered. There is no evidence that the appellant at any time made any specific promise to contribute any sum towards the necessary expense of maintaining the son in a private sanitarium. In fact the evidence is that he declined to make any specific promise. There is no showing that the insane person was not properly treated and taken care of at the asylum to which he had been committed. Neither is there any showing that, if he were placed in a private sanitarium, he would receive better treatment. The question then is reduced to this: Is the appellant liable for any part of the expense here sought to be recovered, when the son had been regularly committed to

the asylum at Steilacoom, was well treated there and was not removed because better treatment could be had elsewhere. The respondent, in causing his removal from a public institution in order that he might be placed in a private asylum, was prompted by a natural feeling. The sentiment which would cause her to take this course is readily understood. Before, however, the appellant can be held liable there must be found some legal foundation for the action. The respondent, in her brief, concludes her discussion of this question with the statement:

"Now we submit that a father cannot thus throw off onto the state his own obligation to support his own child, or thus compel the other spouse to do so. To so hold would open the door to a ready means whereby a class of parents might easily become rid of their natural legal obligations at the expense of the public or a softer hearted spouse."

It must be remembered that the state is not here complaining. If Frank A. Pontius, Jr., at the time he was committed to the asylum was insane, and we must accept this to be the fact, he was properly committed. The law makes no distinction as to the class of persons that may be sent to such an institution. The fact that the parents of the unfortunate son, if it were a fact, were able to maintain him would not bar the doors of the asylum to him, provided he was in fact insane. Upon the record in this case but one conclusion can be arrived at, and that is that it was not necessary for the welfare of the son that he be removed from the public institution and placed in private institutions, and that therefore the money expended for his maintenance and support was not reasonably necessary. The disposition of this question being controlling, it is unnecessary to discuss or determine the other questions argued in the briefs.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16831. Department Two. March 18, 1922.]

MARY VASICSKO, *as Administratrix etc., Appellant,* v. MIKE KUNDRAK *et al., Respondents.*[1]

APPEAL (272)—RECORD—AFFIDAVITS. Affidavits used in the court below cannot be considered on appeal unless brought up by statement of facts or bill of exceptions.

ACTIONS (27-1)—JUDGMENT (213-1)—CONSOLIDATION—CONCLUSIVENESS—CAUSES BARRED—EXTENT OF RELIEF. Where two actions were consolidated, an order of dismissal with prejudice, disposes of both actions, which are considered as one, and bars another action on either cause.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 10, 1920, in favor of the defendants, dismissing an action to recover money belonging to the estate of a decedent. Affirmed.

H. W. Lueders, for appellant.

Lund & Lund, for respondents.

MAIN, J.—By this action the plaintiff, as administratrix of the estate of Michael Vasicsko, deceased, seeks to recover the sum of $600 and interest thereon. When the action came on for trial, upon motion of the defendants, it was dismissed because the questions here at issue had been determined in another action with which this one had been consolidated. From the judgment of dismissal, the appeal is prosecuted. On

[1]Reported in 205 Pac. 9.

or about the 21st of June, 1918, the defendants here, Mike Kundrak and wife, brought an action against Mary Vasicsko, in her individual capacity, for the purpose of quieting title to a certain five-acre tract of land in Pierce county and for possession thereof. This complaint was answered by admissions and denials and an affirmative defense, in which the defendant alleged, among other things, that she had been regularly appointed the administratrix of the estate of Michael Vasicsko, deceased, and asserted equitable title to the property and prayed for conveyance either to her, as administratrix, or to her and her minor children. There was also a prayer for an accounting. On or about December 12, 1918, the present action was begun by Mary Vasicsko, as administratrix of the estate of her deceased husband, seeking to recover, as above stated, an alleged balance due the estate of $600 and interest. On June 16, 1909, upon motion being made, the court entered an order consolidating the two actions. On the 14th day of June, 1919, an order was entered reciting that the issues in the consolidated action had been settled out of court, and that the action be, and was thereby, dismissed with prejudice. After this order of dismissal was entered, the administratrix, in the action brought by her for the $600 claimed to be due and unpaid, sought to bring that action on for trial, and, upon motion of the defendants, it was dismissed on the ground that all matters and things involved in the action had been determined and disposed of when the order of dismissal was entered in the consolidated action.

The controlling question in the case is whether the dismissal in the consolidated action bars the right of the appellant to further prosecute the present action after it had been consolidated with another action and the judgment of dismissal entered. No statement of

facts or bill of exceptions has been brought to this court. There are in the clerk's transcript certain affidavits, but it has been many times held that such affidavits cannot be considered unless they are brought here by a bill of exceptions or a statement of facts. Taking the record made in the trial court of the two actions, and considering them as one after the order of consolidation was entered, there can be no question but that the judgment of dismissal in the consolidated action would prevent the further prosecution of either of the actions. After the two actions were consolidated they would be considered as one, and all the issues involved in each of the actions would be determined by the judgment of dismissal.

In one action the administratrix was defendant in her individual capacity, in the other she was plaintiff in her capacity as administratrix.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 17086. Department One. March 18, 1922.]

THE STATE OF WASHINGTON, *on the Relation of W. R. Nichols et al., Plaintiff*, v. THE SUPERIOR COURT FOR GRAYS HARBOR COUNTY, *Respondent.*[1]

CORPORATIONS (262, 263) — ACTIONS — VENUE — PROCESS — AGENT. Non-resident surety companies may be sued in a county wherein they had a resident agent and office for the transaction of business, and where the bond in suit was negotiated, even though signed elsewhere.

VENUE (9-1)—RESIDENCE OF PARTIES—CO-DEFENDANTS. Where part of the defendants were properly suable in the county, co-defendants are not entitled to a change of venue on the ground of residence in another county.

Application filed in the supreme court February 8, 1922, for a writ of prohibition to prohibit the superior court for Grays Harbor county, Abel, J., from further proceeding with a cause. Denied.

A. R. Titlow, for relator.

John C. Hogan, for respondent.

MITCHELL, J.—W. R. Nichols and others, a copartnership doing business in the name of Pacific Coast Paving Company, residents of Pierce county, Washington, entered into a contract with the state for the grading and paving of a highway in Grays Harbor county, Washington. They gave a statutory contractors' bond, with the United States Fidelity and Guaranty Company of Baltimore and the Aetna Casualty and Surety Company of Connecticut as sureties, for the protection of laborers, materialmen and subcontractors. In the prosecution of the work covered by the contract, the paving company procured certain

[1]Reported in 205 Pac. 745; 207 Pac. 1.

material from the Aberdeen Sand and Gravel Company. Upon the conclusion of its furnishing material, the Aberdeen Sand and Gravel Company filed a notice of claim against the contractors' bond, as provided by statute, for an amount claimed to be due on account of the material furnished. The claim and right of action thereon were assigned in writing by the Aberdeen Sand and Gravel Company to the Harold Blake Company, a corporation, which latter company thereafter commenced an action on the bond against the contractor and the two surety companies, in the superior court of Grays Harbor county. Upon the service of summons and complaint upon the defendants in that action, they appeared specially therein, and upon showing by affidavits that the four personal defendants and the partnership consisting of them were residents of Pierce county, and that the surety companies were nonresident corporations, demanded a change of venue, and that the cause be transferred to Pierce county for trial. The change of venue was denied by the trial court. Thereupon the present proceeding was brought in this court by all of the defendants in the action in the superior court to prohibit the trial court from further proceeding in the action. The application here has been presented upon the affidavits of relators and the return of the judge of the superior court to an alternative writ.

It satisfactorily appears that, at the time of the commencement of the action in the superior court, and at the time the cause of action arose, and for a long time prior thereto, each of the surety companies conducted and maintained an office for the transaction of, and were and had been actively engaged in, business in Grays Harbor county; that each of the surety companies had a regularly appointed and acting agent who

was a resident of Grays Harbor county; that service was had upon each of the surety companies by leaving with its agent, personally, a copy of the summons and complaint, in Grays Harbor county; and that all of these facts were of record and shown to be true at the time of the denial of the motion for a change of venue.

The action in the superior court is on the contractors' bond. The right to sue on the bond is given by the statute, § 1161, Rem. Code (P. C. § 9727), and, of course, the surety companies are proper parties.

The question presented is free from doubt. It is answered by the plain provisions of the statute. Section 206, Rem. Code (P. C. § 8543), declares that an action against a corporation may be brought in any county where the corporation transacts business at the time the cause of action arose, or where the corporation had an office for the transaction of business or any person resides upon whom process may be served against such corporation. Each of the surety companies is a corporation. Each transacted business in Grays Harbor county at the time the cause of action arose, and each, through its resident agent, had an office for the transaction of business in that county at the time of the commencement of the action. It is shown that each surety company, at its place of business in Grays Harbor county, maintained display signs advertising its business, and in the case of at least one of them, the agent had and used the seal of the company in the transaction of its business. It further appears that the bond in suit, so far as the surety companies are concerned, was negotiated through the agencies of the companies in Grays Harbor county, although it appears to have been signed elsewhere on behalf of the companies.

It thus appearing that two of the defendants were properly suable upon this cause of action in Grays

Harbor county and were served with process therein, it follows that all of the defendants were subject to the suit in that county, although others of them were residents of another county.

Writ denied.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

SUPPLEMENTAL OPINION.

[Department One. May 25, 1922.]

PER CURIAM.—It is considered advisable, if not necessary, for the sake of clearness, to supplement the opinion in this case by stating that the provisions of § 13½ of the insurance code, Laws of 1915, p. 589 [Rem. Comp. Stat., § 7045], as follows, "Any insurance company may be sued upon a policy of insurance in any county within this state where the cause of action arose, by serving the summons and a copy of the complaint upon the company, if a domestic company, or upon the commissioner, as attorney in fact of the company, if an alien or foreign company," were observed in this case, as service was made on the insurance commissioner at the commencement of the action, in addition to furnishing copies of the summons and complaint to the local agents of the insurance company in Grays Harbor county.

That the cause of action, or sufficient thereof, arose in Grays Harbor county to bring the case under the section of the insurance code above referred to, as that section has been construed in *Pratt v. Niagara Fire Ins. Co.*, 113 Wash. 347, 194 Pac. 411, appears from the record in this case and as pointed out in the main opinion herein.

This being a question of venue, the conclusion reached by the trial court and in our main opinion was correct.

[No. 17002. Department One. March 18, 1922.]

CHAS. RANDALL, *Appellant*, v. SCHOOL DISTRICT No. 44 OF GRAYS HARBOR COUNTY *et al.*, *Respondents*.[1]

SCHOOLS (36)—DISTRICT TAXES—LEVY—ESTIMATES. Under Rem. Code, § 4537, requiring school district trustees to certify an "estimate in detail" of the amount of the levy necessary, a certificate of a ten mill levy "for school purposes" is insufficient to warrant a levy therefor. [See Rem. Comp. Stat., § 4834.]

SAME (23)—SCHOOL BUILDINGS—SUBMISSION TO VOTE. Under Rem. Code, § 4538, authorizing school directors to build school buildings when "directed by a vote of the district so to do," a school building is not authorized by a vote of the district to levy a tax in the maximum amount for "school purposes," the notices of the election having failed to show what, if any, building or buildings would be built. [See Rem. Comp. Stat., § 4835.]

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered August 27, 1921, in favor of the defendants, dismissing an action to cancel a tax and for injunctive relief, tried to the court. Reversed.

W. H. Abel, for appellant.

George Acret, R. A. Lathrop, and *A. Emerson Cross*, for respondents.

MITCHELL, J.—This action was brought by Charles Randall, as a taxpayer and elector, against school district No. 44, its directors and the treasurer of Grays Harbor county, to cancel that part of the tax against his real estate in the district based upon a special ten mill school levy, and to enjoin the board of directors

[1]Reported in 205 Pac. 748.

from spending money derived from that levy. The superior court denied relief, and this appeal followed.

Upon the arguments in this court, respondents move to strike appellant's brief and abstract of record and dismiss the appeal. We have considered the grounds mentioned therefor, together with the time of presenting the motion and the condition of the record, and are of the opinion the motion should be, and it is, denied.

On the merits, the essential facts are not in dispute. District No. 44 is a school district of the third class. Some time about the first of September, 1920 (the exact date is uncertain), the board of directors of the school district certified to the county commissioners a detailed estimate of the amount of money required in the district during that school year, as follows:

1. Expense of general control	$500.00
2. Expense of instruction	$4,500.00
3. Expense of operation of school plant	$3,000.00
4. Expense of maintenance of school plant	$3,000.00
5. Expense of auxiliary agencies	$2,000.00
6. Payment of outstanding warrants and warrant interest	$.....
7. Land	$.....
8. New buildings	$.....
9. Additions to buildings	$.....
10. Equipment of new buildings and grounds	$350.00
11. Equipment of old buildings and grounds	$4,000.00
Total	$17,350.00

Dated this.....day of....., 192..

FRANK A. ZEIGLER,
Clerk School District No. 44, Grays Harbor County.

This certificate was made pursuant to § 4537, Rem. Code[1] (P. C. § 5038), which provides that the school directors shall annually, at a meeting preceding the annual tax levy for state and county purposes, "report to the board of county commissioners an estimate in detail of the amount of funds which will be required by

[1]NOTE: See Rem. Comp. Stat., § 4834.

their district for all purposes for the ensuing year", which the commissioners are authorized and required to levy and collect, after deducting the estimated receipts from the state and county apportionments for the district. Thereafter, by an order of the county superintendent of schools, entered on September 9, 1920, a part of the district was set off and made to constitute a separate school district, No. 78. On September 27, 1920, pursuant to what may be assumed was a proper posting of notices, district No. 44 held a special election to vote on "a special ten mill levy for building purposes." The vote was thirty-two for and sixteen against the project. Thereupon district No. 44, by its clerk, certified to the board of county commissioners as follows:

"I, Frank A. Zeigler, clerk of School District No. 44 Grays Harbor county, Washington, do hereby certify that at a special election, duly held in said school district, on the 27 day of Sept., 1920, the following amount of money, special 10 mill tax, was voted by the duly qualified electors of said school district, for school purposes in said school district during the present school year.

"You are hereby authorized to levy a sufficient rate on the taxable property of said school district to produce the amount voted in the excess of the estimate made by the board of directors now on file in your office.

"Dated this 27 day of September, 1920.

"Frank A. Zeigler, Clerk.

"School District No. 44, Chehalis County, Wash.

"Note: This notice must be filed with the clerk of the board of county commissioners on or before the first day of September."

The county superintendent of schools, under date of October 7, 1920, certified to the county commissioners a demand for a non high school levy of $996 against district No. 44.

Thereupon, at the session in October, 1920, the session for making the levy for state and county purposes, the board of county commissioners, pursuant to the above mentioned reports, estimates, certificates and demands, levied against the taxable property in district No. 44 the following amounts: "Estimate of expenses $17,350," the amount specified in the annual detailed estimate certified about September 1; "estimate of receipts $1,604", consisting of $802 from each the state and county apportionment; "net amount tax $15,746; non high school tax $996." It was further provided by the order of the county commissioners in making the levy, as follows:

"And whereas, certain school districts have, in addition to the estimate of expenses above set out, voted special taxes by special election, as shown by the certificate of the clerks of said districts, on file with the clerk of this board, as follows: Dist. No. 44, Amount 19,928.00. It is therefore ordered that the county assessor extend against the taxable property of the above school districts, a sufficient number of mills levy to produce the required amounts."

It is contended by the appellant that there was no authority by which the county commissioners could make the ten mill levy. We think the contention is sound. The certificate of the school district (pertaining as it did to the so-called special election on September 27) was not to the effect that the ten mill tax was to be devoted to building purposes, but only for "school purposes". The statute, § 4537, Rem. Code (P. C. § 5038), provides that the certificate of the school directors shall contain an estimate in detail of the amount of funds needed for all purposes for the year, and limits the levy to be made by the county commissioners at not to exceed one per cent of the assessed value of all the taxable property of the district, with

the understanding that, if a greater expenditure is necessary, the question shall be submitted to the voters at a special election, which additional tax shall not exceed one per cent. But certainly there is nothing in the statute to suggest or justify the claim that, in reporting and certifying the levy attempted to be authorized by the special election, it was in any manner exempt from the provisions of the law that it contain an "estimate in detail" of what the amount is needed for. If it was for building purposes it should have been so certified by the school district. Here the report was simply for "school purposes", without any detail. The printed form that was used in making the annual report on or about September 1 provided a space under the item "new buildings" in which to insert the amount needed for that purpose, in addition to items "equipment of new buildings and grounds" and "equipment of old buildings and grounds", each of which was filled in in the annual report to the county commissioners, thus showing the necessity of certifying that it was for new buildings, if such was the real purpose, rather than certifying it was for simply school purposes. As the special election results were certified, and as the levy was made thereon by the county commissioners "for school purposes", the directors of the district would be at liberty to expend the money for any purpose within their general powers, exclusive of new buildings, unless prevented by the interposition of the courts.

Another contention made by the appellant is that the special election to vote on the ten mill tax was void. Section 4538, Rem. Code[1] (P. C. § 5039), provides that the board of directors of school districts of the

[1]NOTE: See Rem. Comp. Stat., § 4835.

third class shall build school houses when directed by vote of the district to do so. In this case it is not pretended that, prior to this time, there had ever been any formal election or gathering called of the patrons or electors of the district to consider the necessity for, plan or place of constructing any new building or other improvement. The notice of the special election contained no such information. It was an election simply to vote money to the limit, pretending it was for building purposes. It is not the policy of the law to permit the levy of a tax simply for the purpose of spending it, but rather it is the policy of the law to provide for necessary buildings and improvements and to pay for them by the levy of a tax according to the law. Further, it is the policy of the law that those who are to be served and who must do the paying shall determine or be advised with a reasonable degree of certainty of the kind of improvement intended, together with its approximate cost, that they may intelligently direct by a popular vote. Here no building or improvement was specified, nor approximate amount mentioned as its cost. It is entirely reasonable that one would be willing to vote a ten mill levy if necessary to raise sufficient amount to pay for a needed improvement, but opposed to even a five mill levy to meet the cost of a building or buildings beyond the reasonable requirements of the district. The controlling feature of the statute is the reasonable necessities of the district, and not the possible limit of taxation. It is peculiar in this case that the amount called for was not specific but was put upon the millage basis. It would produce an amount not known to the voter, except upon hearsay or a somewhat intricate examination of public records as to the equalized value of the property in the district, recently reduced in area by an order of the county superintendent of schools. The

school district was outside of any incorporated town or city and apparently had a small attendance. The testimony shows that a school building had been recently built in the district at a cost, with equipment, of $20,000, and was considered and known to be elaborately equipped.

Immediately upon filing their annual report containing estimates, among others, of $350 for equipment of new buildings and grounds, and $4,000, equipment of old buildings and grounds the directors instituted proceedings to procure by a vote of the people, $19,928 more for building, and didn't know themselves at that time what they did intend to build, and consequently could not, and did not, attempt to give the taxpayers any information on that subject. One of the school directors, answering his own counsel's questions, upon referring to the contents of the notice of the special election, testified as follows:

"Q. And how did you want them put up. A. We wanted them to be put up and wanted them to designate that this ten mills was to be used for building purposes instead of designating some special subject which would hold and bind us to that one subject; in case we had money left over from this one project we wanted to build a teachers' cottage but if we didn't have enough left over— Q. What was the project. A. That was the auditorium for the children. Q. A gymnasium. A. Yes, a gymnasium and play ground."

And that is the kind of notices that were put up. Certainly, if the district needs and desires a new building, a gymnasium or additional playground, it can procure it or all of them, if within its means, by following the requirements of the statutes.

Covert intentions of the trustees of public funds find no favor in the rules for the construction of statutes designed to produce or dispose of such funds. A grant of power to levy taxes must be strictly con-

strued and the methods prescribed by the legislature substantially followed. A failure to substantially comply with statutory requirements is not a mere irregularity, at least unless it is so declared by statute, but is a fatal omission which vitiates the tax.

We conclude the special election for a ten mill tax, and the following levy by the county commissioners attempting to carry it into execution, are void, and that the appellant is entitled to the relief demanded in his complaint.

Reversed, with directions to the superior court to enter judgment accordingly.

PARKER, C. J., BRIDGES, and TOLMAN, JJ., concur.

FULLERTON, J. (concurring)—I concur in the judgment ordered, for the second reason stated in the foregoing opinion.

[No. 16769. Department One. March 18, 1922.]

THE CITY OF SEATTLE, *Respondent*, v. LILY CURTIS, *Appellant*.[1]

NUISANCE (31-1)—PROSECUTION—ISSUES AND VARIANCE. In the absence of objection to the complaint, it is not error to admit evidence of the condition of particular portions of the premises, although not set out in the complaint.

SAME (30)—JURISDICTION—NOTICE. It is not a prerequisite to a criminal prosecution for a nuisance that notice was given to the owner.

SAME (32)—EVIDENCE. In a prosecution for a nuisance by tenants of the defendant, notice to the owner is sufficiently shown by oral notice and knowledge of the posting of written notice.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 23, 1921, upon

[1]Reported in 205 Pac. 374.

a trial and conviction of maintaining a nuisance. Affirmed.

Reuben D. Hill, for appellant.

Walter F. Meier, George A. Meagher, and *H. R. Fullerton,* for respondent.

MITCHELL, J.—The appellant was convicted in the police court of Seattle of the crime of permitting premises belonging to her to become nauseous, foul, offensive and injurious to the public health, and unpleasant and disagreeable to adjacent residents, contrary to an ordinance of the city. She appealed to the superior court and was again convicted.

It is argued that the court committed error in allowing, and afterwards refusing to strike, certain testimony of the city's witnesses relative to the condition of particular portions of the premises it was claimed by the city and its health officers constituted a nuisance. It is insisted they were not set out in the complaint. But the complaint was in no way moved against; it is in the language of the ordinance and was sufficient to allow the testimony objected to.

The argument that the court committed error while the evidence was being given, by a ruling that notice to the owner of the premises before the commencement of this action was not required by the law, may be disposed of by noticing that this is not an action for the abatement or suppression of a nuisance, but is a criminal action for the violation of an ordinance of the city against the maintenance of a nuisance.

There was ample testimony, though disputed, to show that the appellant had ample notice of the condition of the premises that the authorities complained of, and that she refused to remedy the unsanitary condition. She was notified orally and, also, in writing, by

notice posted by the commissioner of health upon the building next to but other than the building mentioned in the complaint. Some contention is made by the appellant that proof of the notice posted was prejudicial, but clearly not so, since the notice referred to and mentioned the building upon which it was put, and also the building described in the complaint, both of which were adjoining, and all the property of the appellant. It was shown the appellant was aware of the posting of the notice. Manifestly, the purpose of the proof was to show that she, who had tenants in the property, had actual notice of the condition of the property and that the public authorities were claiming it to be a nuisance.

It is also contended the evidence was insufficient to justify the verdict and that a new trial should have been granted, but the record satisfies us to the contrary. Affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and TOLMAN, JJ., concur.

[No. 16982. Department One. March 18, 1922.]

JOHN B. STEVENS & COMPANY, *Appellant*, v. C. A. PRATT *et al.*, *Respondents*.[1]

LANDLORD AND TENANT (101)—RENT—SURRENDER. Where the landlord fails, on notice and demand, to make necessary repairs to premises that had become unsafe, and breached its covenant to keep the premises in repair, the tenant is justified in abandoning the premises and is not liable for rent after such surrender.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 17, 1921, upon findings in favor of the defendants, dismissing an action for rent, tried to the court. Affirmed.

E. D. Hodge, for appellant.

W. H. Pratt, for respondents.

MITCHELL, J.—John B. Stevens & Company, a corporation, the owner, by a written contract with C. A. Pratt, let "all of the two north sections of those certain warehouses, docks and wharves located on lots 105-110 in the Northern Pacific Railway Company's plat A of Tacoma tide-lands, Tacoma, Washington," for a period of three years commencing on January 15, 1920. It was stated in the lease that the premises were let "for general warehouse and dockage purposes." Among other things, the lease provided, "the lessor further covenants that it will keep the premises in its present state of repair, or as may be required by Federal, state and municipal authorities, as against reasonable wear, usage and damage by the elements," and also, "the lessee herein accepts the said premises above mentioned with full knowledge of their present location, state of repair and surroundings." The lease was

[1]Reported in 205 Pac. 10.

almost immediately assigned to a copartnership, with the knowledge and consent of the lessor, who thereafter received from the occupants the monthly rentals provided for in the lease.

Pursuant to written notice theretofore given, and claiming that the premises had become unsafe and unfit to be used for dock purposes, notwithstanding oral and written demands for needed repairs, the tenants abandoned the premises on April 14, 1921, and this action was brought to recover the rent due for the month commencing April 15, 1921. The trial without a jury resulted in favor of the tenant, from which the lessor has appealed.

The trial court found that the lessor failed, neglected and refused to keep the docks, wharves and warehouses in the state of repair required by the lease, failed to keep them in the state of repair required by the municipal authorities, and permitted the docks, wharves and warehouses to deteriorate to such an extent that they became unsafe for use for dockage and warehouse purposes, and became dangerous and unsafe for workmen using the same. It was further found, that steamboat companies and persons owning and operating vessels landing at the wharves refused to longer allow them to land there, and refused to do business with the respondents because of the unsafe condition of the wharves; that the respondents, on February 21, 1921, notified the appellant of the unsafe and defective condition of the premises and requested that they be suitably repaired, but that appellant failed and refused to make any repairs, and by reason thereof respondents were compelled to and did vacate the premises. The record makes it pretty clear that the defense asserted and covered by the findings has been established by a preponderance of the evidence.

The case is not one where a tenant remains in possession and seeks to avoid the payment of rent, or any part of it, because the landlord has failed to uphold the premises according to his obligation, but it is a case in which a tenant is defending against a claim for rent for a period of time occurring after he has been compelled to vacate the premises because of their unsafe and unfit condition occasioned by the failure of the landlord to comply with his obligation to repair.

It is to be deduced with reasonable certainty from the authorities that when the magnitude of the violation of the covenant to repair on the part of the landlord reaches the point where the premises are no longer fit for the purposes intended, such conduct on the part of the landlord operates to impair the consideration for the lease, and also to breach the implied covenant for the quiet enjoyment of the premises, and has the resultant effect of releasing the tenant from any further liability to pay rent, provided he abandons the premises to the lessor. Such is the right and reason of the matter.

Indeed, bearing in mind the fact that the appellant did covenant to make repairs, it is argued, and authorities are cited on behalf of the appellant, that:

"Failure of the appellant to keep the premises in repair would not entitle the respondent to vacate the premises and declare the lease void unless the premises were thereby rendered so untenantable as to amount to a constructive eviction, the remedy of respondents being a claim for damages for breach of covenant or to make the repairs and charge the same against the rent."

One of the authorities cited by the appellant, 16 R. C. L., p. 692, § 178, states the rule as follows:

". . . Where, however, a landlord has covenanted or is under obligation to repair and by reason of his

failure to do so the premises have become untenantable, this may, it seems, according to the better rule in this country, constitute a constructive eviction justifying the tenant in abandoning the premises."

A number of cases are furnished in support of the text, including Ann. Cas. 1916B, p. 124, which has an extensive note and list of cases on the subject. This case falling within the rule, was, in our opinion, correctly decided by the trial court.

Affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and TOLMAN, JJ., concur.

[No. 17064. *En Banc.* March 18, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Automobile Insurance Exchange, Plaintiff*, v. E. V. KUYKENDALL, *Director of Public Works, Respondent.*[1]

INSURANCE (1)—AUTHORITY TO DO BUSINESS—INDEMNITY INSURANCE. An "Automobile Insurance Exchange," having complied with Rem. Code, § 6059-85, for the organization of "interinsurers," brings itself within the definition (Id., 6059-2) of a "company" authorized to write insurance, and is such a company within Laws 1921, p. 341, § 5 [Rem. Comp. Stat., § 6391], requiring surety bonds from a company licensed to "make liability insurance," for all automobiles transporting passengers for hire. [See Rem. Comp. Stat., §§ 7033, 7130.]

SAME. Subdivision 13½ of Rem. Code, § 6059-83, having been added to the insurance code, expressly authorizing motor vehicle insurance against liability resulting through operation of the vehicle or transportation, the same falls within Laws 1921, p. 341, § 5 [Rem. Comp. Stat., § 6391], requiring jitney surety bonds from a company authorized to "make liability insurance," easily and radically differing from the class of subdivision 6, § 6059-83 [Rem. Comp. Stat., § 7128], covering employers' liability insurance.

[1]Reported in 205 Pac. 392.

JUDGMENT (214)—BAR—SCOPE OF ESTOPPEL. The reversal of an order quashing an alternative writ of mandamus and consequent reinstatement of the writ becomes of no moment when the parties stipulate that the determination of a pending cause shall be conclusive in the prior one.

Application filed in the supreme court January 20, 1922, for a writ of mandamus to compel the director of public works to receive and file policies of insurance relating to the operation of motor vehicles. Granted.

Frank C. Owings and *John B. Van Dyke,* for relator.

The Attorney General and *Raymond W. Clifford, Assistant,* for respondent.

Troy & Sturdevant, for intervener.

MACKINTOSH, J.—Mandamus is asked requiring the director of public works to receive and file policies of insurance issued by Automobile Insurance Exchange, in compliance with § 5, ch. 111, p. 341, Laws of 1921[1]. This action is supplemental to that reported in *State ex rel. Gillespie v. Kuykendall,* 117 Wash. 415, 201 Pac. 778, the relator in that action being the intervener in this, the controversy in both actions being primarily between that relator and the relator here, Automobile Insurance Exchange. He was a former member of the exchange and is now seeking to prevent its writing insurance under the section above referred to, which reads as follows:

"The Commission shall in the granting of certificates to operate any auto transportation company, for transporting persons, and, or, property, for compensation require the owner or operator to first procure liability and property damage insurance from a company licensed to make liability insurance in the state of Washington or a surety bond of a company licensed to write surety bonds in the State of Washington on each

[1]NOTE: See Rem. Comp. Stat., § 6391.

motor propelled vehicle used or to be used in transporting persons, and, or, property, for compensation, in the amount of not to exceed $5,000.00 for any recovery for personal injury by one person and not less than $10-000.00 and in such additional amount as the commission shall determine, for all persons receiving personal injury by reason of one act of negligence and not to exceed $1,000.00 for damage to property of any person other than the assured, and maintain such liability and property damage insurance or surety bond in force on each motor propelled vehicle while so used, each policy for liability or property damage insurance or surety bond required herein, shall be filed with the commission and kept in full force and effect and failure so to do shall be cause for the revocation of the certificate."

(1) It is claimed that the Automobile Insurance Exchange is not a "company" within the provisions of that section, which provides that insurance "from a company" shall be procured, etc. The argument is that the exchange is not incorporated and has no charter, and that the section is confined to incorporated companies, and that the insurance code of this state requires all insurance to be made by incorporated companies. On the contrary, however, the insurance code makes explicit provision for the writing of insurance by a concern such as the exchange. In the first place, § 6059-2, Rem. Code (P. C. § 2909) [Rem. Comp. Stat., § 7033], provides:

"The terms 'Company,' 'Corporation,' or 'Insurance Company' or 'Insurance Corporation,' in this act, unless the context otherwise requires, includes all corporations, associations, partnerships, or individuals engaged as insurers in the business of insurance."

If, under this definition, the exchange can be said to be a "company," then it is a "company" within the meaning of Laws of 1921, p. 341, § 5 [Rem. Comp. Stat., § 6391]. The organization of the exchange is that known as "inter-insurers," and the organization

of such concerns is provided for in the insurance code, for we find in § 6059-85 (P. C. § 2992) [Rem. Comp. Stat., § 7130], that:

"The following number of citizens of the United States, two-thirds of which number shall be residents of the state of Washington, may incorporate a company as follows: . . . for an organization of 'Inter-Insurers,' not less than twenty five; . . . by making and subscribing written articles of incorporation . . . which articles shall state: . . ."

Then enumerating the contents of the articles.

The record shows that these provisions have been complied with by the exchange. Section 6059-86, subd. 5 (P. C. § 2993) [Rem. Comp. Stat., § 7131], provides that no domestic mutual insurance company shall be authorized to do business until it shall have qualified as follows:

"If it is formed to transact business as inter-insurers only between the parties forming the company and all parties who shall become members and inter-insurers therein, no such company shall be formed nor transact any business as insurers until not less than twenty-five persons or parties, each of whom must be worth in his or its own right not less than twenty thousand dollars above all liabilities, in property located within this state, such fact to be determined by the commissioner, and in determining the same he may take the verified statement of such parties, and the signed reports of a reputable commercial agency having upward of one hundred thousand subscribers, which persons or parties shall first prescribe and adopt the terms and conditions upon which they will be governed and become inter-insurers each with the other, and each shall be individually liable with every other solvent member of such company to ratably pay and discharge all losses and legal claims accruing against such company: . . ."

The insurance code expressly providing for a concern such as the relator here, brings it within the defi-

nition given in § 6059-2, and therefore the exchange is such a "company" as is called for in § 5, ch. 111, p. 341, Laws of 1921.

(2) The next complaint against the relator is that it is not authorized to write the kind of insurance provided for in § 5, ch. 111, p. 341, Laws of 1921. The certificate issued to the relator by the insurance commissioner of the state which authorizes it to do business grants to that company the authority "to write insurance in the state of Washington, in classes named as follows: Class 5, fidelity and surety insurance authorizing the issuance of motor vehicle bonds required by ch. 57, p. 227, Laws of 1915, and class 13½, motor vehicle insurance, all hazards (inter-insurance plan)." As far as the discussion of this question is concerned, the insurance code, in Rem. Code, § 6059-83 (P. C. § 2990) [Rem. Comp. Stat., § 7128], which classifies the different types of insurance, is as follows:

"(5) Fidelity and surety insurance, being the guaranteeing of persons holding the places of public or private trust; guaranteeing the performance of contracts other than insurance policies; or guaranteeing and executing all bonds, undertakings and contracts of suretyship.

"(6) Liability insurance, being all insurance against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person and for which the insurer is liable. . .

"(13½) Motor vehicle insurance, being insurance on motor vehicles operated by power generated within or withon such vehicles, except those operating on water or on rails, against loss or damage or loss of use of or to the vehicle, furnishings, tools, appliances and equipment; or legal liability for loss or damage to persons or property resulting through the operation of the vehicle; caused by fire, self-ignition and explosion, theft, collision, or other insurable hazards, including all hazards incident to transporting such vehicle by land or by water."

The right of the relator to write surety insurance, which is one of the forms of insurance called for in § 5, ch. 111, p. 341, Laws of 1921, cannot be questioned under the authority given it by the insurance commissioner to write insurance under class (5) just noticed. The only question arises as to the extent of the authority under class 13½. The insurance code, when it was originally passed in 1911, contained classes 5 and 6, but did not contain class 13½, and the only provision for liability insurance was that provided in class 6. At that time the issuance of liability insurance, such as that provided for in ch. 111, Laws of 1921, was a class of business little known to the law, and the insurance code carried no provision for the writing of such insurance, and class 6 by its terms was principally applicable to liability arising between employer and employee. In 1913, the insurance code was amended so as to add classification 13½, which expressly relates to motor vehicle insurance and recognizes a class of insurance easily and radically differing from that covered in class 6. It is the intervener's contention that because § 5 of ch. 111, p. 341, Laws of 1921, provides for the procuring of liability and property damage insurance from a company authorized to make "liability insurance", that the relator here, not being a company authorized to write liability insurance under class 6, is not empowered to write the insurance called for in § 5, ch. 111, p. 341, Laws of 1921 [Rem. Comp. Stat., § 6391].

If the intervener's argument is sound, strictly speaking, there could be no policy written under § 5 except surety bonds, for the companies authorized to write only under class 6 could not write the kind of insurance called for by § 5. Class 13½, it will be noticed, expressly provides that companies writing motor vehicle insurance shall write "legal liability (insurance)

for loss or damage to persons or property, etc.," and a company authorized to do business under class 13½ would certainly be a company authorized to write liability and property damage insurance under a license to make liability insurance, falling within the exact words of § 5. It therefore must be held that a company authorized to write insurance under class 13½ is authorized to write the exact kind of liability insurance called for by § 5.

The fundamental error of the relator in this connection is that he assumes that the only form of liability insurance known to the insurance code is that which is provided for in class 6, whereas class 13½ provides for a special form of liability insurance by including it in motor vehicle insurance. The case of *Hadfield v. Lundin,* 98 Wash. 657, 168 Pac. 516, Ann. Cas. 1918C 942, is inappropriate, as that case merely decided that the requirement that a "surety bond" be given by jitney drivers was not satisfied by procuring a "liability bond." So here, if § 5 called for nothing but the furnishing of surety bonds, the exchange would not be authorized to write insurance under class 13½, and the furnishing of a policy of that classification would not satisfy the requirement of a "surety bond."

(3) The real reason why the director of public works has refused to accept the policies offered by the relator is not because he questions the right of the relator under its certificate of authority to write the policies called for in § 5, but that he fears that he has been enjoined from accepting such policies by the conditions existing in the former case of *State ex rel. Gillespie v. Kuykendall,* above. He has taken the position that, in that case, a temporary restraining order therein issued is still in effect and that he dare not violate its terms by receiving and filing these policies. In that action an alternative writ of prohibition was

issued restraining the director of public works from receiving and filing bonds issued by the exchange, or to show cause why he should not be permanently restrained. The director's demurrer to the petition was sustained by the lower court and the alternative writ was quashed. On appeal, this court reversed the action of the lower court and sent the cause back for hearing on the merits, holding that the demurrer had been improperly sustained. It is the director's position that this action reinstated the alternative writ of mandate and that he is in danger of being in contempt of court if he receives and files these policies offered by the relator here. This matter is of no concern now, in view of the fact that all parties interested have stipulated in this present action that the determination of this cause shall be conclusive of the prior one, and the disposition of this case, therefore, terminates all matters involved in the case of *State ex rel. Gillespie v. Kuykendall.*

For the reasons stated, the writ will issue.

PARKER, C. J., BRIDGES, MAIN, HOLCOMB, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

[No. 17017. Department Two. March 20, 1922.]

GEORGE H. MILLER, *Appellant*, v. HANS L. FRYBERG *et al.*, *Defendants*, FARRELL LUMBER COMPANY *et al.*, *Appellants*, AMERICAN SAVINGS BANK AND TRUST COMPANY, *Respondent*.[1]

MECHANICS' LIENS (71)—PRIORITY—MORTGAGES. A mortgage given to a contractor for the price of a house to be built on the premises has priority over claims for liens for materials furnished to the contractor after the recording of the mortgage, as provided by Rem. Code, § 1132, even though the mortgage was assigned and the assignment was not recorded as required by Id., § 8781 [Rem. Comp. Stat., § 10596].

MECHANICS' LIENS (71)—MORTGAGES (89)—PRIORITY—ASSIGNMENT OF MORTGAGE—RECORDING. Notwithstanding Rem. Code, § 8781, requiring assignments of mortgages to be recorded, the failure to record the assignment of a mortgage, given to a contractor for the price of a building to be constructed on the premises in consideration of which the contractor agreed to pay all labor and material liens, does not subordinate the mortgage to a materialman's lien for material furnished to the contractor upon his false representations that he was still the owner of the mortgage and would pay for the material out of the proceeds of the mortgage (HOVEY, J., dissenting).

Appeal from a judgment of the superior court for King county, Abel, J., entered July 29, 1921, in favor of the defendant bank, decreeing the priority of a mortgage over mechanics' liens, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Hadley & Hadley, for appellant Farrell Lumber Company.

Milo J. Loveless, for appellant George H. Miller.

Henry Clay Agnew, for appellant Burton Dinsmore.

Farrell, Kane & Stratton, for respondent.

HOLCOMB, J.—Fryberg and wife, being the owners of the real estate involved herein, in King county,

[1]Reported in 205 Pac. 388.

Washington, and desiring to construct a dwelling house thereon, made, executed and delivered to W. J. Byrne their note for $2,300, payable five years after date, and a first mortgage upon the real estate, maturing five years after date, which instruments were dated February 27, 1920. In consideration of the note, and mortgage securing the same, Byrne gave Frybergs no money, but agreed to construct the dwelling, and from the money represented by the note and mortgage, pay for all labor and material furnished and used in the construction of the house.

The mortgage was recorded in the office of the auditor of King county on March 10, 1920. Prior thereto, Byrne had entered into an agreement with the McGillvray Building Company, one of the defendants herein, for the construction of the dwelling house, and it proceeded with the construction, but had done nothing prior to the recording of the mortgage. On March 8, 1920, Byrne assigned the note and mortgage given him by Fryberg and wife to respondent, American Savings Bank and Trust Company, a banking corporation, together with other notes and a mortgage received by Byrne from another, receiving the full amount of this mortgage in consideration of the assignment of the notes and mortgages. The bank failed to record its assignment of the mortgage until December 2, 1920. The McGillvray Building Company, after it proceeded with the construction of the dwelling house, purchased lumber to be used therein from appellant Farrell Lumber Company about March 24, 1920, and which lumber was used in the construction of the building.

The Farrell Lumber Company investigated the title to the property prior to commencing to furnish the materials and discovered the mortgage from Fryberg and wife to Byrne of record, and thereupon refused to furnish lumber to be used in the construction of the build-

ing. Thereupon Byrne went to the office of the lumber company and stated that he held the mortgage upon the premises; that the mortgage was given for the purpose of securing funds to construct a dwelling house thereon, and that he had advanced no money to the Frybergs, but intended to use the fund represented by the note and mortgage to pay claims for labor and materials; and to that effect, on March 25, 1920, Byrne addressed and delivered a letter to the Farrell Lumber Company in which he stated that he had made a building loan upon the Fryberg property, describing it, and that he would be pleased to deduct and pay to the Farrell Lumber Company, out of the first mortgage, the amount of its bill, stating that the lot was clear and his mortgage was put thereon for the purpose of advancing money to build, and that he owned the mortgage. Upon receipt of this letter, and on March 26, 1920, the lumber company proceeded with the delivery of the lumber required to be used in the construction of the building, and ceased to furnish material on June 26, 1920, having furnished a total of the value of $1,446.95, upon which Byrne had paid the sum of $500, and after deducting certain credits, the lumber company's claim amounted to $821.90.

The other lien claimants herein were in the same condition as the Farrell Lumber Company, except that the Farrell Lumber Company had refused to deliver materials until it had a written agreement from the mortgagee of record that he would pay its bill. No labor or material was furnished prior to the execution and recording of the mortgage given by the Frybergs to Byrne. None of the lien claimants had notice of the assignment of the mortgage from Byrne to the American Savings Bank & Trust Company prior to their furnishing of the labor and materials.

On July 20, 1920, appellant Miller commenced his action to foreclose his lien, which had been previously filed, and filed a *lis pendens* on the property of defendants Fryberg.

After the filing of the assignment of the mortgage from Byrne to the American Savings Bank & Trust Company, the Farrell Lumber Company, which was an intervener in the Miller action to foreclose liens, brought in the American Savings Bank & Trust Company as a defendant. It filed its answer and cross-complaint, setting up the assignment of the Fryberg note and mortgage from Byrne to it on March 10, 1920, as collateral to secure the payment of a note of $3,800 executed by Bryne to the bank, and prayed for foreclosure of the Fryberg note and mortgage as a prior lien upon the property. To this answer and cross-complaint, issue was made, setting up the facts as hereinbefore stated, and on the trial of the cause, judgment was entered whereby the mortgage executed by the Frybergs to Byrne and assigned to the American Savings Bank & Trust Company by Byrne was decreed to be a prior lien upon the premises described, and foreclosed as such. Judgment was granted for the full face of the note, together with interest and attorney's fees, and provided for a deficiency. Appellants were each given judgment for the full amount of their liens, with costs and attorney's fees, in the order of priority, but were each adjudged junior and subsequent to the judgment of the American Bank & Trust Company as assignee of the Byrne mortgage.

It is shown that the American Savings Bank & Trust Company took the note and mortgage long before maturity, and in good faith, and that it had no knowledge of any infirmity or agreement of any kind attached to it that would destroy or affect its negotiability. It is further shown that the dealings had by the bank with

Byrne up to the time and after this loan was made were entirely satisfactory, and no question or trouble had ever developed in any prior business transactions, and that there was nothing connected with this loan to warn the bank in any way of any infirmity or indicate that it was not a *bona fide* transaction.

Appellants urge as error the adjudication of the American Savings Bank & Trust Company assigned mortgage to be a prior lien to that of appellants; and in granting the judgment to the American Savings Bank & Trust Company for the full amount of the Fryberg note and mortgage, refusing to apportion the amount to be recovered by it between the Fryberg note and another note held as collateral along with the Fryberg note.

It is the contention of appellants that, by failing to file its assignment, which would have given notice to materialmen and mechanics that it had acquired Byrne's interest in the Fryberg note and mortgage, the bank permitted Byrne to record the mortgage and defraud the lien claimants by dealing with them as the owner of the mortgage, and that the bank lost its priority as against the subsequent lien claimants by reason of § 8781 Rem. Code (P. C. § 1914). That section is as follows:

"All deeds, mortgages and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world." [Rem. Comp. Stat., § 10596.]

We held in *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57, that the above statute should be considered to mean *bona fide* mortgagors or incumbrancers as well as *bona fide* purchas-

ers, and provided protection for all such subsequent to the given conveyance or mortgage; and held in the same case that the statute quoted imposed upon any given mortgagee the duty of making a public record of his mortgage for the information and guidance and protection of those who, at a subsequent time, may have occasion to deal concerning the land, failing in the discharge of which duty, he shall lose the priority otherwise to be accorded to him.

Appellants therefore insist that the statute cited applies to the assignment as well as to the mortgage itself. *Seattle National Bank v. Ally,* 66 Wash. 610, 120 Pac. 94, is quoted and strongly relied upon as being to that effect. That case dealt with the subsequent release of a mortgage duly recorded, rather than an assignment. The mortgagee in that case, for a valuable consideration, sold and indorsed the notes and delivered them, with the mortgage, to the transferee, but did not execute or deliver to the transferee any written assignment of the mortgage. Thereafter, and without the knowledge, authority or consent of her transferee, she executed and delivered to the promisor and mortgagor, Ally, a written release of the mortgage, and the release was filed for record. On the same day the release was filed, Ally executed and delivered to another his note secured by a mortgage upon the same real estate, which was recorded on the date of its execution. The Seattle National Bank, which held the mortgage first executed by Ally, which had been satisfied of record by the mortgagee, brought suit to foreclose the mortgage upon its assignment. The court entered a decree of foreclosure and adjudged that the mortgages of Lichtenberg and others were liens prior to that of the Seattle National Bank.

Under the situation shown in that case, there is no doubt that the decision was correct, but it does not

apply to the situation in this case. There the transferee of the notes took no assignment of the mortgage which it could have recorded, and did not have it in its power, as between it and the mortgagor, to prevent the mortgagee from subsequently releasing or assigning the same mortgage of record. When other intending incumbrancers examined the record, they found that the mortgage to the national bank, which had once been a lien upon the property, had been satisfied and released, and upon the strength of that record a new mortgage was given as a first lien upon the property to another mortgagee, and another mortgage given as a second lien to another mortgagee, both of whom were absolutely innocent parties and parted with valuable consideration. In the case at bar, any one dealing with the Frybergs or with the real estate in question and examining the record would find Byrne's mortgage of record. They would find that the lien of the mortgage was ahead of any lien which they could obtain. They obtained no interest in the mortgage and had done nothing in the way of furnishing materials or labor prior to the recording of the mortgage which would give them priority under our lien statutes. Our lien statutes in Rem. Code, § 1132 (P. C. § 9709), provided that mechanics' and materialmen's liens shall be ". . . preferred to any lien, mortgage or other incumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice." Here the Byrne mortgage had been recorded prior to the furnishing of any labor or materials, and the lien claimants had constructive notice of it. The Farrell Lumber Company had both constructive and actual notice of it. It is claimed that it is in a different position from the other appellants because of the letter

which Byrne gave it promising to pay it out of the proceeds of the mortgage; but we think it is in no better position than any of the other claimants. It obtained no assignment of the mortgage which it could hold as against the bank's unrecorded assignment. The letter, in fact, was simply a promise to pay out of the proceeds of the mortgage, and the lumber company must have been expecting to obtain its pay out of such proceeds, but from Byrne, not from the bank.

The law is well settled that:

"Priority once obtained cannot be lost. The registry of a deed or mortgage is equivalent to a notice of it to all persons who may subsequently become interested in the property, and fully protects the grantee's rights. A mortgage having once obtained priority by record does not lose its place by being held by anyone under an unrecorded assignment. And although the mortgagee had notice of a prior unrecorded mortgage, or there are equities such that his own mortgage is in his hands subject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities, the assignee is entitled to hold the mortgage as a prior lien upon the land, solely upon the ground that it was first recorded. . . .

"This precedence follows them through any subsequent transfer, or through any proceedings to enforce the liens . . ." Jones on Mortgages (7th ed.), § 525, p. 828.

To the same effect are the following authorities: *Curtis v. Moore,* 152 N. Y. 159, 46 N. E. 168, 57 Am. St. 506; *Peoples Trust Co. v. Tonkonogy,* 144 App. Div. 333, 128 N. Y. Supp. 1055; *Nashua Trust Co. v. Edwards Manufacturing Co.,* 99 Iowa 109, 68 N. W. 587, 61 Am. St. 226; 19 R. C. L., § 131, pp. 361, 362.

(It may be observed that we do not concur with all the reasoning and statements in the Iowa case above cited, for that court there held that lienors and incum-

brancers could not be considered as purchasers for value without notice; while we held that they are entitled to protection as purchasers, as heretofore stated.)

We are bound to conclude that the judgment and decree of the trial court was correct, and it is affirmed.

Parker, C. J., Main, and Mackintosh, JJ., concur.

Hovey, J. (dissenting)—I dissent. When the legislature included assignments of mortgages in the recording statute they should be deemed to have intended the recording of these instruments to have the same effect as the recording of the other instruments named in the act. The recording of an assignment is not alone for the benefit of the holder but is also for the protection of other persons who deal with property. As long as the record shows the original mortgagee to be the owner, third persons dealing with the property should be justified in so treating him. In *Seattle National Bank v. Ally,* 66 Wash. 610, 120 Pac. 94, the holder of the instruments had failed to take an assignment, but so far as third persons were concerned, the holder was in no different position than the holder in this case. In fact, this holder was more negligent because it had an assignment and failed to record it. It seems to me that the statute is clearly against the respondent, and the equities are even more so, as in this case the mortgaged property has been improved and the security increased as a result of the negligence of the respondent, and it is permitted to profit by its own failure to comply with the provisions of the statute which says "assignments of mortgage shall be recorded."

[No. 16642. *En Banc.* March 20, 1922.]

JOE MULLER *et al.*, *Appellants*, v. F. H. BARDSHAR *et al.*, *Respondents.*[1]

CHATTEL MORTGAGES (27)—RECORDING—COUNTY. Where an automobile was sold in K. county to a resident of W. county and it was stipulated that the purchaser should not remove it from W. county, it in effect was delivered in W. county, and that was the proper place to record a chattel mortgage given for the purchase price.

SAME (28)—RECORDING—EFFECT OF REMOVAL. Under Rem. Code, § 3668 [Rem. Comp. Stat., § 3788], providing that mortgaged personal property removed from the county shall be "exempted" from the operation of the chattel mortgage unless the mortgage is recorded within thirty days in the county to which it is removed, applies to mortgaged property in W. county, purchased in I. county within thirty days after its removal to I. county, notwithstanding the purchaser knew the owner lived in W. county and did not investigate the records in W. county where the mortgage was duly recorded.

HOVEY and MITCHELL, JJ., dissenting.

Appeal from a judgment of the superior court for Island county, Bell, J., entered May 6, 1921, upon findings in favor of the defendants, after a trial to the court upon stipulated facts, in an action for equitable relief. Reversed.

James Zylstra, for appellants.

Carver & Pixley, for respondents.

HOLCOMB, J.—This is a suit in equity, brought by appellants to enjoin respondents from selling an automobile mortgaged by appellants' vendor, L. A. Morse, to respondent Bardshar.

On June 24, 1920, respondent Bardshar, at Seattle, Washington, sold the car in question to one L. A. Morse, a resident of Bellingham, Whatcom county. At that place and time, Morse paid Bardshar a portion of

[1]Reported in 205 Pac. 845.

the purchase price and gave back a chattel mortgage on the car for the balance of the unpaid purchase price. In the chattel mortgage it was stipulated that the mortgagor would not remove the property from the county of Whatcom, state of Washington. The chattel mortgage was not filed in King county, where the car was sold, but was, on June 30, 1920, and within ten days after the date of the transaction, filed for record in the office of the county auditor of Whatcom county. On July 9, 1920, appellant Joe Muller purchased the automobile, as it was stipulated and found by the trial court, for value and in good faith, in Island county, Washington, without any knowledge whatever of the chattel mortgage, but with knowledge that Morse resided in Whatcom county. He made no search of the records of Whatcom county. Bardshar learned of the removal of the car to Island county about November 17, 1920. Since July 9, 1920, the car has been in the possession of Joe Muller in Island county, and was there located when the sheriff of Island county attempted to sell the same by notice and sale, and was restrained by order of the trial court.

The case was submitted to the trial court upon stipulated facts, and judgment for the amount of the mortgage and costs was entered in favor of the respondent Bardshar and against the appellants, as plaintiff and sureties.

Appellants first contend that the mortgage should have been recorded within ten days from its date in King county, Washington, where the sale was made. We are of the opinion, however, that under the terms of the transaction, it being known that the purchaser, Morse, was a resident of Whatcom county, and it being stipulated that he was to retain possession of the car in Whatcom county, and not permit it to be removed therefrom, the parties thereto, in effect, stipulated that

the car was delivered to the purchaser in Whatcom county, the county of his residence, and that the situs of the car at the time the mortgage was given should be deemed to be Whatcom county.

The car having been delivered to Morse in Whatcom county, and the chattel mortgage filed for record within ten days after the date of the mortgage, we will assume that that was the proper place of filing the mortgage. *Stitt v. Spengel House Furnishing Co.*, 58 Colo. 559, 146 Pac. 770.

The mortgage not having been filed in Island county within thirty days after removal of the property to that county, as required by Rem. Code, § 3668[1] (P. C. § 9748), appellants contend that the lien was lost, even though the car was purchased within the thirty-day period permitted by the statute for the filing of the mortgage after the property was removed thereto.

The statute referred to is very precise. It provides:

"When personal property mortgaged is thereafter removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either,— 1. The mortgagee within thirty days after such removal causes the mortgage to be recorded in the county to which the property has been removed; . . ."

Respondents contend that, since the purchase of the automobile was made within the thirty days allowed by the statute after the removal from Whatcom county, the purchaser could not claim the benefit of the statute. We are of the contrary opinion. The language used in the statute, that the property *is exempted* from the operation of the mortgage unless the mortgage is filed within thirty days after its removal, is equivalent to saying that the lien is absolutely lost

[1]NOTE: See Rem. Comp. Stat., § 3788.

as to a subsequent purchaser, or anyone except the parties to the mortgage, if the property is not followed and the mortgage filed for record within thirty days after its removal to the county. A similar case was decided in *Turner v. Caldwell,* 15 Wash. 274, 46 Pac. 235, where horses constituted the chattels mortgaged. The chattels were then situated in King county, and the mortgage recorded there. They were subsequently taken to Chehalis county, and the mortgage was also recorded there. Thereafter the chattels were removed from Chehalis county to Mason county, and remained there until levied upon by the sheriff by virtue of an execution in favor of another, which levy was made long after the period of thirty days from the time of removal of the horses to Mason county had expired. The mortgage was never filed for record in Mason county. It was attempted to be shown in that case that, at the time of the levy, the respondents knew of the existence of the mortgage. We held that that was insufficient to sustain appellant's claim. That the statute provided that, when mortgaged property is removed from the county, it is, except as to the parties to the mortgage, exempted from its operation, unless within thirty days after the date of such removal the mortgage is recorded in the county to which the property has been taken, and this without regard to any knowledge of the existence of such mortgage by the parties subsequently claiming the mortgaged chattels, precluding any relief under the mortgage; and we further held that it was the obligation of the mortgagee to keep track of the mortgaged property and see that the same was not taken from the county where it was mortgaged, or that the mortgage lien was preserved as pointed out by the statute. See, also, *Merritt v. Russell & Co.*, 44 Wash. 143, 87 Pac. 70.

". . . we are not permitted to look beyond the statute for aid in the general rules of law or equity." *Smith v. Allen,* 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D 300.

In *First National Bank of Everett v. Northwest Motor Co.,* 108 Wash. 167, 183 Pac. 81, where we sustained the lien of a chattel mortgage upon the facts there appearing, it was said:

"It may be admitted, for the purposes of this decision, that, if the sale occurred in May, the Northwest Motor Company acquired a good title because the mortgage was not filed or recorded in King county within the thirty days specified in the statute. On the other hand, if no title then passed, but a sale occurred in November and was made subject to the mortgage held by the respondent, then the judgment of the trial court should be sustained.

"Upon conflicting evidence, the trial court found the facts to be in accordance with the contentions of the respondent."

The mortgagee in this case never filed his mortgage in Island county, where the car was taken, within the thirty days allowed by the statute, nor at any other time, and yet proceeded to sell the car under foreclosure by notice and sale in Island county, long after its removal to that county, long after the thirty days therefrom had expired, as if the lien existed there, when it did not. It had no more existence in Island county, after thirty days from the removal from Whatcom county, than if it had never been executed at all.

Had the mortgage been recorded or filed in Island county within the thirty days provided by statute, the purchaser of the car might have been able to do something to satisfy the lien with the mortgagee and protect his title.

For these reasons, we are of the opinion that the decree of the lower court was wrong and should be reversed.

Reversed with costs.

PARKER, C. J., TOLMAN, MAIN, FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

HOVEY, J. (dissenting)—I dissent. Morse, who held the legal title to the car and lived in Whatcom county, drove it to Island county and sold it to the appellant, who had full knowledge of Morse's residence, although he had no actual knowledge of the mortgage.

The provision of the statute relative to recording should be given a rational construction. In the first place, it recognizes that there is a valid lien by virtue of the filing at the original situs of the property, and for a full period of thirty days after removal. In the second place, the original owner is not relieved from the obligation by the failure to refile. Now the purchaser takes his title and succeeds to all the rights of the original owner while the lien is in full force, and, of course, subject to the lien, of which he has constructive notice by the original filing. His position is fixed at the time of purchase. Can he contend for a compliance with a provision which can only be effective as against parties dealing with the property after the thirty-day period has expired and which cannot have any possible effect upon him? I think not. In construing this provision we must consider its object. It is notice, constructive it is true, but nevertheless notice. Of what avail is notice after the rights are fixed? To say that the mortgagee must file his mortgage to preserve the lien as against a purchaser who buys within the thirty-day period is to sacrifice substance to form.

As against the mortgage, the original situs of the property is not changed until it is kept in the new county thirty days. This simply imposes a measure of reasonable care upon purchasers of personal property in looking to the source of their title. The filing in the new county is constructive notice to those who deal with the property after the expiration of the thirty-day period.

The opinion of the majority is likely to facilitate fraudulent disposal. The owner can transfer property into a neighboring county, dispose of it and return to his resident county, and after the property has been so hidden for thirty days, the lien would be lost.

The case of *Davis & Co. v. Thomas*, 154 Ala. 279, 45 South. 897, is squarely in point that the mortgage need not be filed in the county of purchase, and the reasoning of the case is equally applicable on the second point in this case. "It will not do to be governed uniformly by the literal expression of the statute, for by so-doing we should many times wander entirely from the obvious intention of the legislature."

Appellants cite *Turner v. Caldwell*, 15 Wash. 274, 46 Pac. 235, but the property was purchased in that case after the thirty-day period following removal had expired.

In my opinion, the proper filing of the mortgage in Whatcom county preserved the lien for thirty days after its removal, and the purchase being made within that time, it was made while the car was subject to the lien of the mortgage, and the failure to subsequently file did not affect this transaction.

MITCHELL, J., concurs with HOVEY, J.

[No. 16977. Department Two. March 22, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. O. S. LARSON, *Appellant*.[1]

BANKS AND BANKING (4-1)—OFFICERS—CRIMINAL RESPONSIBILITY—UNLAWFUL LOANS. The giving of a note by a bank officer for the purpose of taking up an overdraft which he owed the bank, is not the making of a loan to himself, within Laws 1917, p. 297, § 52 [Rem. Comp. Stat., § 3259], and does not support a charge of the making of a loan on the date the note was given.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered June 14, 1921, upon a trial and conviction of a violation of the banking laws. Reversed.

Tucker & Hyland and *Hayden, Langhorne & Metzger*, for appellant.

J. W. Selden and *J. A. Sorley*, for respondent.

MAIN, J.—The defendant was charged by indictment with the crime of loaning money of a banking corporation, of which he was an officer, to himself, without such loan first having been authorized by resolution of the board of directors, as required by the statute. Upon the trial, after the state had offered its evidence and rested, the defendant moved for a directed verdict, one of the grounds of the motion being in effect that the evidence had failed to support the charge as alleged in the indictment. This motion was overruled, and the defendant thereupon rested and offered no testimony in his behalf. Upon the record made by the state's evidence, the cause was submitted to a jury and a verdict of guilty returned.

From the judgment and sentence entered with verdict, the defendant appeals. The charging part of the indictment reads as follows:

[1]Reported in 205 Pac. 373.

"That the said O. S. Larson, in the county of Pierce and state of Washington, on or about the 27th day of June, 1919, then and there being an officer of the Scandinavian American Bank of Tacoma, a banking corporation duly organized and existing under and by virtue of the laws of the state of Washington, did then and there on behalf of such corporation unlawfully and feloniously loan to himself the sum of six thousand ($6,000) dollars, the money and property of said banking corporation, without a resolution authorizing the same and approved by a majority of the directors at a meeting at which said defendant was not present, having been first entered in the corporate minutes, contrary to the form of the statute, etc."

The evidence offered by the state tended to show that, on June 26, the appellant drew and signed a note, payable to the order of the Scandinavian-American Bank of Tacoma, of which he was an officer, for the sum of $6,000. On the face of the note appears this: "Pending adjustment of salary account board of directors." The note bore interest at the rate of six per cent per annum. This note, on the day following its date, or June 27, 1919, came into the hands of the note teller of the bank and was entered upon the books on that day. At the time the note was given, the defendant had an overdraft in the bank in the excess of $6,000. When it was given it operated to cancel the overdraft to the extent of $6,000. The appellant received no money on the note at the time it was given, or subsequently. A witness on behalf of the state who was a note holder of the bank, on cross examination, testified as follows:

"When this note was executed on June 27, 1919, Mr. Larson's account with the Scandinavian-American Bank was overdrawn a little in excess of $6,000. Q. So that when that note for $6,000 was executed that overdraft was reduced to that extent upon it? A. Yes."

The question is whether the defendant, by giving the note on June 27, was loaning money to himself as an officer of the bank without first having such loan authorized by resolution of the board of trustees, as the statute requires. Section 52 of ch. 80, p. 297, Laws of 1917 [Rem. Comp. Stat., § 3259], provides:

"No bank or trust company shall, nor shall any officer or employee thereof on behalf of such corporation, directly or indirectly, loan any sum of money to any director, officer or employee of such corporation, unless a resolution authorizing the same and approved by a majority of the directors, at a meeting at which no director, officer or employee to whom the loan is to be made shall be present, shall be entered in the corporate minutes. . . ."

By this statute, if the appellant, at the time he gave the note, loaned money to himself as an officer of the bank, directly or indirectly, he would come within the provisions of the statute. If, on the other hand, the loaning occurred when the overdraft was made, and the giving of the note was only the changing of the evidence of an indebtedness already existing and did not constitute a loaning, then the case should not have been submitted to the jury. The theory of the prosecution, as shown by the indictment, and also by the evidence which was offered in support thereof, was that the appellant was guilty under the statute of making the loan by giving of the note which was dated on June 26 and entered on the books of the bank on the following day. If the making of an overdraft by an officer of the bank is an offense under the section of the statute above quoted, the evidence fails to support the charge as laid in the indictment. As defined in 7 Corpus Juris, § 445, p. 712, "A loan by a bank, like any other loan, is the furnishing of anything, usually money in the case of a bank, on condition that the thing loaned or its equivalent in kind shall be re-

turned. . . ." An overdraft arises when a customer of a bank draws therefrom more money than is standing to his credit in his account with the bank. When the overdraft is made, the customer becomes indebted to the bank to the extent thereof, and upon such debt interest will accrue at the lawful rate. *Payne v. Freer,* 91 N. Y. 43, 43 Am. St. 640. In the syllabus in the case of the *United States v. Allis,* 73 Fed. 165, it is said:

"Every overdraft, whether made by previous arrangement or not, whether secured or not, and whether drawing interest or not, is a loan, and is required by the law and the rules prescribed by the comptroller to be listed and reported as an overdraft."

In the body of the opinion in that case, appears the same statement in the instructions which were given upon the trial and which were subsequently approved by the holding in the case without discussion. It seems clear that the appellant cannot be liable, under the statute above quoted, both for making the overdraft and for giving the note subsequently, which did nothing more than extinguish the overdraft to the extent of the amount for which the note was drawn. If the making of an overdraft by an officer of the bank without first having been authorized so to do by a resolution of the board of trustees is not making a loan, either directly or indirectly as the statute states, then an officer may overdraw his account with the bank with which he is connected and be immune from prosecution under the statute. If this view were taken, then the appellant would not have been guilty under this law of making an overdraft on the bank of which he was an officer, had he refrained from making the note which extinguished the greater portion of the overdraft. It follows from this that the trial court was in error in submitting the case to the jury.

The judgment will be reversed, and the cause remanded with direction to dismiss the proceeding.

Parker, C. J., Holcomb, Bridges, and Hovey, JJ., concur.

[No. 16379. Department Two. March 23, 1922.]

J. A. Taylor, *Appellant*, v. J. L. Basye, *Respondent*.[1]

Landlord and Tenant (129)—Unlawful Detainer—Defenses. An arbitration and award between a landlord and tenant, whereby the tenant was to retain possession of the leased premises until the landlord had made full repayment of a substantial sum in cash, goes solely to the right of possession and therefore is a good defense to an action of unlawful detainer.

Arbitration and Award (1)—Contracts (39)—Validity—What Law Governs. A written agreement for an arbitration and award, not affecting the title to real property in this state, good as a common law award and valid in the state where made, will be enforced in this state, although it was not made a matter of record nor judgment entered upon it, as required of awards in this state.

Appeal from a judgment of the superior court for Clarke county, Blake, J., entered November 12, 1920, upon sustaining a plea in abatement, dismissing an action of unlawful detainer. Affirmed.

Miller, Wilkinson & Miller, for appellant.

Frank H. Hilton, for respondent.

Hovey, J.—Appellant brought an unlawful detainer action against the respondent, and the trial court sustained a plea in abatement, discharged the jury and entered judgment for respondent.

The controversy grows out of a lease of real estate and a sale of personal property. On November 1, 1919, appellant leased about nine hundred acres of land to the respondent for a term of years, at an annual rental

[1]Reported in 205 Pac. 16.

of $1,000. Respondent paid the first year's rent by giving $500 in cash and his note for the remaining $500. At the same time appellant sold respondent considerable personal property for which the latter paid $4,000 in cash. Within a few months after the lease was made, the parties had difficulty and, at appellant's request, they went to the city of Portland, Oregon, where appellant resided, and there entered into an arbitration agreement for the settlement of all their difficulties. Arbitrators were appointed and conducted a hearing and made an award in writing, by the terms of which appellant was to take back certain of the personal property and was to have possession of a new house upon the premises on April 1, 1920, and pay to respondent a substantial sum in cash. Respondent was to be permitted to stay on the balance of the premises until April 20, 1920, and to retain possession, without rental or charge, for a period of ten days after full payment had been made by appellant. It appears from the testimony that appellant so far accepted the award as to take possession of the dwelling house, but he refused to comply with the other terms of the award, and his present action was brought in May, 1920.

It is first contended by appellant that this, being an action of unlawful detainer, the arbitration award cannot be interposed as a defense. *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Phillips v. Port Townsend Lodge F. & A. M.*, 8 Wash. 529, 36 Pac. 476; *Monroe v. Stayt*, 57 Wash. 592, 107 Pac. 517, 30 L. R. A. (N. S.) 1102; *Hutchinson v. Wilson*, 54 Wash. 410, 103 Pac. 474, are cited. These are all cases where outside issues are sought to be brought into the case. This action is one for the recovery of the possession of real property, and a defense which goes solely to the right of

possession cannot be said to be without the issues, and, in our opinion, the portion of this award which is material to this issue raises simply this question.

We come now to consider the effect to be given to the award. This court has held that an agreement for arbitration made in this state is without effect unless it complies with our statute. *Dickie Manufacturing Co. v. Sound Constr. & Eng. Co.*, 92 Wash. 316, 159 Pac. 129. It is admitted that this award is good as a common law award and legal under the laws of the state of Oregon, where it was made, and it seems to be sufficient in all respects to comply with the laws of this state, except that it was never made a matter of record nor judgment entered upon it as our laws prescribe. The parties entering into the agreement were both in the state of Oregon. The subject-matter embraces a lease which, under our laws, is a chattel interest *(Tibbals v. Iffland,* 10 Wash. 451, 39 Pac. 102; *American Savings Bank & Trust Co. v. Mafridge,* 60 Wash. 180, 110 Pac. 1015), and certain other personal property concerning which the parties were free to contract irrespective of where it was situated.

It is a familiar principle that a contract good in the state where it is made can be enforced in another state even though it is not executed with the formalities required in the latter state (13 C. J. 252), and this rule has been applied to agreements for arbitration. 5 C. J. 33. In this case, appellant has accepted a part of the award, but it is not necessary for us to pass upon the question whether this in itself would estop him from questioning the legality of it. It is also unnecessary for us to pass upon the effect to be given to the exception in our statute of controversies respecting the title to real property. The title to the land is not involved in this action nor is it affected by the award.

In our opinion, the plea was a proper one and the judgment is affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 16762. Department Two. March 23, 1922.]

A. DONALD CAMERON, *Respondent*, v. MILDRED C. BUSTARD *et al.*, *Appellants*.[1]

ADVERSE POSSESSION (26, 31, 41)—HOSTILE ENTRY—CLAIM OF RIGHT—EVIDENCE—SUFFICIENCY. There was no entry upon vacant real estate under a claim of right which could ripen into title by adverse possession, by one who, contemplating the acquisition of title by tax foreclosures, sought from the owner and her agent permission to enter upon and occupy the premises, and receiving no reply, moved in and made improvements, later acquiring tax certificates and filing a complaint in foreclosure in which it was alleged that the true owner was "the owner" of the premises and had abandoned the same.

ABANDONMENT—REAL PROPERTY—EFFECT OF TITLE. Perfect legal title to real property is not lost by abandonment.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered June 4, 1921, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Reversed.

Browder Brown and *J. W. A. Nichols*, for appellant.

Louis J. Muscek, for respondent.

W. C. Elliott, for defendant Ella M. Buck.

MAIN, J.—The plaintiff brought this action to quiet title to certain real property of which he was in possession and which he claimed to own. The defendant Mildred C. Bustard denied the plaintiff's right, and asserted ownership to the property. On the issues

[1]Reported in 205 Pac. 385.

thus framed, the case came on for trial, and resulted in a judgment sustaining the plaintiff's title. From this judgment, Mrs. Bustard appeals.

Mrs. Bustard was the record owner of the property and, prior to the fall of 1909, had occupied it as a residence. From the latter part of the year 1909 until October, 1910, the property was vacant and unoccupied, Mrs. Bustard having moved to Portland, where she resided continually up to the time of the trial of this action. The respondent claims title by deed from Mrs. Ella M. Buck, which was executed on May 29, 1920. In the fall of 1910, the property being vacant, Mrs. Buck went into possession of it and remained there until a short time before she sold and conveyed the same to the respondent. The respondent's title rests upon adverse possession, claimed to have been open and notorious and under claim of right for more than ten years, or from the time that Mrs. Buck entered into the possession thereof.

In 1912, Mrs. Buck purchased certificates of delinquency which were against the property and thereafter began foreclosure of the same. As the result of such foreclosure, she received a deed dated February 20, 1915. For reasons which it is not necessary here to detail, the foreclosure proceeding was void and no rights are asserted by the respondent from that source. If the respondent prevails, it must be by reason of the fact that title had been acquired by adverse possession for a period of ten years. It will be admitted that all the elements of adverse possession are present and that the respondent is entitled to prevail, providing that Mrs. Buck, when she entered the property, entered under claim of right, and continued to occupy the same under a claim of right, prior to the time that she received the deed as a result of the tax foreclosure.

Inquiry will first be directed as to whether she entered the property under claim of right. Before she entered, she sought out and interviewed a Mr. Gregory, who had formerly been the agent of Mrs. Bustard and from whom she sought permission to occupy the property. She also received from him the address of Mrs. Bustard in Portland, to whom she wrote a letter with reference to occupying the property, but no answer was received to this letter. The property at this time was in a somewhat delapidated condition and the city authorities would not permit its being occupied as a residence unless it was put in a sanitary condition. Upon cross-examination, Mrs. Buck testified that, when she entered the property, it was her purpose to acquire title through a tax foreclosure. Upon redirect examination, she modified this to some extent and stated that the property had been vacant a while and she "just moved in", and the fact that it was vacant was what caused her to move in. On recross-examination, she testified:

"Q. Did he give you authority as her agent to move into the house? A. He says, 'Mrs. Buck, I cannot rent the place because there is no sewer there; there is no toilet; the city had condemned it.' I said, 'If I can fix that up with the city have I your permission?' 'Sure', he said, 'You have my permission.' "

Thereafter, Mrs. Buck occupied the property, put it in a sanitary condition, made improvements upon it from time to time, and from the time that she acquired the tax certificates in 1912, paid the taxes and assessments which were levied against it. The complaint in the tax foreclosure proceeding was signed and verified by Mrs. Buck on the 29th day of March, 1913. The defendants named therein were Mrs. Bustard and the unknown owners if any. In the complaint it is recited that the defendants, one of whom was Mrs. Bustard,

were the owners or the reputed owners of the property.

If Mrs. Buck did not enter under claim of right, and did not assert a claim of right prior to the time of the verification of this complaint, the respondent's title must fail. When one enters into the possession of property the title to which is in another, there is a presumption that such entry is in subordination to the title of the real owner, and it is necessary that a hostile intent or a claim of right must be shown. *O'Donnell v. McCool,* 89 Wash. 537, 154 Pac. 1090.

The evidence in this case will not sustain a finding that Mrs. Buck entered the property in 1910 under a claim of right, or that she asserted a claim of right prior to the tax foreclosure proceeding. The allegation in the complaint in the tax foreclosure to the effect that Mrs. Bustard was the owner, which complaint, as above stated, was signed and verified by Mrs. Buck, is pursuasive evidence that, up to that time, she had not held the premises by a claim of title hostile to that of Mrs. Bustard. *City of Cleveland v. Cleveland, C., C. & St. L. Ry. Co.,* 93 Fed. 113. On the matter of the claim of right, as we view it, the evidence goes no further than that Mrs. Buck, knowing the property was vacant in the fall of 1910, sought possession from one who she thought was the agent, and also from the owner. After having sought a right to enter and having received no reply from the owner, she went into possession, made improvements and purchased the tax certificates. The evidence fails to show a claim of right prior to the tax foreclosure. In the respondent's brief, there is frequent reference made to the fact that Mrs. Bustard had abandoned the property when she vacated it in the fall of 1909 and went to Portland to reside, but the law is that a perfect legal title to corporeal real property cannot be lost by abandonment. 1 C. J. 10. The appellant was

entitled to a judgment quieting her title and placing her in possession of the property.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment as herein indicated.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16779. Department One. March 23, 1922.]

GERTRUDE ESTES *et al., Respondents,* v. FRANK W. BABCOCK *et al., Appellants.*[1]

CARRIERS (78-3, 78-6)—STREET RAILWAYS (13, 16)—COLLISIONS WITH VEHICLES—SPEED—NEGLIGENCE. In a passenger's action against the operators of a bus and a city, for injuries sustained in a collision between the bus and a city street car, the negligence of the defendants is for the jury where the evidence on the question of excessive speed and failure to give warning signals was conflicting.

MUNICIPAL CORPORATIONS (380)—USE OF STREETS—ORDINANCES. An ordinance providing that no person shall operate a vehicle in any other than a careful and prudent manner, . . . nor so as to collide with another vehicle, when considered as a whole, is reasonable and not void for uncertainty.

DAMAGES (124) — TRIAL (93) — INSTRUCTIONS — APPLICABILITY—MENTAL ANGUISH. In an action for personal injuries, it is error to give an instruction allowing damages for mental anguish where there was no evidence that plaintiff suffered mental anguish other than the pain and incapacity naturally incident to the injuries complained of.

EVIDENCE (214)—EXPERTS—FACTS FORMING BASIS OF OPINION. A patient's statements to a physician testifying as an expert, are admissible to determine the weight to be given to the physician's opinion, but not as evidence to prove the actual condition of the patient at the time.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 8, 1921, upon the verdict of a jury rendered in favor of the plaintiffs,

[1]Reported in 205 Pac. 12.

in an action for personal injuries sustained by passengers in an auto bus struck by a street car. Reversed.

Carkeek, McDonald, Harris & Coryell and *Stanley J. Padden,* for appellants Babcock and Ryan.

Walter F. Meier and *Nelson T. Hartson,* for appellant City of Seattle.

Ryan & Desmond, for respondents.

TOLMAN, J.—On October 31, 1919, respondents were passengers in a free automobile bus operated by appellants Babcock & Ryan, on their way from the Union Station to the Hotel Arlington, in the city of Seattle. The hotel is, or was, situated on the west side of First avenue, about eighty feet south of its intersection with University street. The bus on which respondents were riding, in order to reach the hotel, proceeded northerly up the east side of First avenue past the hotel, and when the proper point in the street intersection was reached, the driver started to make the turn across the double line of street car tracks, occupying the center of First avenue, so as to continue his course to the hotel entrance. When the turn had been partially completed and the bus was headed well towards the south, though still on the westerly car track, a street car approaching from the north struck the rear of the bus, the force of the impact throwing Mrs. Estes from her seat and causing the injuries of which she complains. The action was tried to a jury, which found a verdict against all of the defendants for $3,000, and from a judgment on the verdict, they have appealed.

The complaint charges negligence on the part of appellants Babcock & Ryan in the following particulars: (1) that the bus was driven at an excessive and unlawful rate of speed; (2) that the attempt to

turn the bus was made between street intersections instead of at an intersection (but no evidence was offered in support of this allegation); (3) that the driver failed to sound a warning signal before attempting to turn; and (4) that he so operated the bus as to cause it to collide with the street car in violation of the terms of the traffic ordinance.

The city is alleged to have been negligent in, (1) operating the street car at an unlawful rate of speed; (2) employing an incompetent operator; (3) that the instrumentalities intended to control the speed of, and stop the car, were defective; and (4) that the motorman failed to sound any warning signal of his approach, or check the speed of the car when the danger of a collision became apparent.

Appellants appeared both below and here by different counsel; and on behalf of appellants Babcock & Ryan, it is urged that their challenge to the sufficiency of the evidence should have been sustained; but, as we read the record, there was some evidence in the case from which the jury could find a verdict against either or both of the appellants. Upon the question of excessive speed and the giving of warning signals, for instance, the evidence was conflicting and these were questions therefore for the jury.

It is next urged that the trial court erred in admitting in evidence § 60 of Ordinance No. 39,720, and in instructing the jury thereon, because it is contended that that part of the ordinance referred to is void for uncertainty. The ordinance reads:

"No person shall ride or drive any horse, nor drive or operate any vehicle in any other than a careful and prudent manner, nor at a greater speed than is reasonable or proper, having due regard to the traffic and use of the street by others; nor so as to endanger the life, limb or property of any person, nor so as to col-

lide with any animal or vehicle or street car or strike against any person or property."

and the court instructed thereon as follows:

"It is the positive law of this state that no person driving or operating any vehicle shall drive or operate the same in any other than a careful and prudent manner, nor at any greater speed than is reasonable or proper, having due regard to the traffic and use of the street by others, or so as to endanger the life and limb of any person, nor so as to collide with any animal or vehicle or street car or strike against any person or property."

It is contended that, under this ordinance and this instruction, the jury might find one of the parties to this action to be wholly without blame, and yet feel bound to bring in a verdict against him. While the language of the latter part of the section is open to criticism, yet we think its meaning so apparent that none can be misled, and when read as a whole it cannot be considered to mean other than that one must drive or operate his vehicle in a careful and prudent manner and so as not *to cause* it to collide with or strike against any other object. When so read, its provisions are certain, reasonable, provide a proper standard, and are capable of being enforced.

Error is assigned upon the instruction which permitted the jury to assess damages for mental anguish. We find nothing in the record which justifies such an instruction, and no evidence that Mrs. Estes suffered any mental anguish or anything other than the pain and incapacity naturally incident to such injuries as she complains of. We are satisfied with the rule laid down in *Bennett v. Oregon-Washington R. & Nav. Co.*, 83 Wash. 64, 145 Pac. 62, and hence must hold that the learned trial court was in error in giving this instruction.

It is further urged that the court erred in permitting a physician, called as an expert witness, to testify as to statements made to him by Mrs. Estes regarding her condition, upon which he based his opinion. Such evidence is admissible for the purpose of affording the jury some means of determining the weight to be given to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time. This, we think, is the general rule. *Barber v. Merriam,* 11 Allen 322; *Shenandoah Valley Loan & Trust Co. v. Murray,* 120 Va. 563, 91 S. E. 740; *Acme Cement Plaster Co. v. Westman,* 20 Wyo. 143, 122 Pac. 89.

Because of the erroneous submission of the question of mental anguish, the judgment is reversed and the case remanded for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16860. Department One. March 23, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. ALLEN H. SHEARS, *Appellant*.[1]

HABEAS CORPUS (24)—DISCHARGE—BAR. A discharge on habeas corpus of one extradited and brought to this state upon a complaint before a justice of the peace, on the ground that the complaint was unfounded, that no crime had been committed, and that the extradition was irregular and illegal, is not a bar to a prosecution for the same crime, under an amended information filed by the prosecuting attorney.

INDICTMENT AND INFORMATION (16)—PRELIMINARY PROCEEDINGS. A preliminary hearing before a justice of the peace, of one charged with a felony, is not necessary to the filing of an information.

EMBEZZLEMENT (5)—DEFENSES—REPARATION. In a prosecution for larceny by embezzlement by an agent of insurance companies, an offer of reparation by return of the money stolen is no defense, there being no question of defendant's good faith in his dealings.

INDICTMENT AND INFORMATION (72)—DUPLICITY—CONTINUING OFFENSES. An information charging that an agent of insurance companies at divers times and continuously between January 1, 1917, and September 22, 1918, had custody and control as such agent of $3,500, which he feloniously withheld and appropriated to his own use, does not charge a multiplicity of crimes.

EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution of an insurance agent for embezzlement, evidence of transactions on behalf of two companies is admissible where it was alleged that he was agent of the two companies, doing business under the name of Philadelphia Underwriters.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 24, 1920, upon a trial and conviction of larceny. Affirmed.

Vince H. Faben and *F. W. Crary*, for appellant.

Malcolm Douglas, T. H. Patterson, and *Chester A. Batchelor*, for respondent.

MITCHELL, J.—The appellant was convicted of grand larceny. It was charged against him that, in King

[1]Reported in 205 Pac. 417.

county, on December 1, 1917, and at divers times thereafter continuously until September 22, 1918, he being the agent of the Fire Association of Philadelphia and the Insurance Company of North America, corporations of Philadelphia, Pennsylvania, doing business under the name of the Philadelphia Underwriters, did then and there have intrusted to him, and have in his possession, custody and control as such agent, $3,500, the property of his principals, and that he did then and there unlawfully, fraudulently and feloniously withhold and appropriate the same to his own use, with intent to deprive and defraud the owners thereof.

He refused to plead when called upon so to do, and the plea of not guilty was entered for him by direction of the trial court. At the time of his arraignment, and thereafter on several occasions down until the commencement of the trial, the appellant, by special appearances, interposed and insisted upon what he terms special pleas in abatement and to the jurisdiction of the court. The refusal of the court to allow the special pleas has induced the appellant to make three assignments of error, which may be considered together.

Originally the appellant was charged with this same offense by a complaint filed in the justice of the peace court in Seattle. Not being in this state at that time, he was brought here by extradition proceedings. Prior to any preliminary examination by the justice of the peace, and while the appellant was in the custody of the sheriff of King county, he instituted habeas corpus proceedings in the superior court of that county. In his petition therein it was alleged in substance that the complaint upon which the governor of this state issued his requisition was unfounded in fact and law; that no crime had been committed; that the proceedings had been instituted for the collection of a debt; and that

all proceedings before the governor of this state and the governor of the asylum state were irregular, illegal and entirely without jurisdiction. Upon the return made by the sheriff, it was ordered by the court that the exceptions of the petitioner to the return be granted and sustained, and it was "further ordered and adjudged that the writ of habeas corpus be issued and sustained and that the defendant be discharged from custody by virtue of said writ and this decree." With those proceedings, including the judgment, we are in no wise concerned, other than to determine if they are available to the appellant in the present case. It appears that, at the conclusion of the habeas corpus case, the prosecuting attorney filed the information upon which the appellant was brought to trial. It is claimed by the appellant that the judgment in the habeas corpus case is a bar to the present action, and it is also claimed that, as the justice of the peace before whom complaint was first made never held a hearing or gave a trial, therefore the superior court could not entertain jurisdiction.

Section 2109, Rem. Code (P. C. § 9162), provides for the pleas that may be interposed upon arraignment. They are, (1) a plea of guilty; (2) a plea of not guilty; and (3) a plea of former conviction or acquittal. In the case of a plea of acquittal, the statute requires that it designate the court and date of the judgment relied upon. The judgment in the habeas corpus case relied on here was not an acquittal on the merits, but only a discharge from the custody of the sheriff. It was not a discharge from the penalty of the crime and did not operate as an acquittal so as to bar a prosecution and trial on the merits. It shows on its face there was no investigation into the guilt or innocence of the accused. 16 C. J. 255, § 411, and cases cited; 16 C. J. 257, § 423; *In re Milburn*, 9 Peters (U. S.) 704,

9 L. Ed. 280; *Benson v. Palmer,* 31 App. D. C. 561, 17 L. R. A. (N. S.) 1247. The criminal procedure under which he has now been tried and convicted, though for the same crime, is a different procedure and upon different process from that which resulted in his first arrest and subsequent dismissal on habeas corpus. He is charged with having committed a felony, and the rule in this state is that a preliminary hearing before a committing magistrate prior to the filing of an information is neither required nor essential. *State v. McGilvery,* 20 Wash. 240, 55 Pac. 115.

Another assignment is that the court erred in refusing to permit the appellant to show good faith and an attempt to compromise before the commencement of the criminal proceedings. It is necessary to somewhat notice the manner in which he conducted his business for his principals. Policies issued by him were to be made out as follows: Policy, daily report, and his own agent's daily record, at one time, the two latter ones being carbon copies. In scores of cases his copies were false. He reported the fictitious records to the company and failed to report the policies actually issued. Those reported called for small premiums, while those actually issued called for large premiums that were collected by the appellant. Probably the most of the policies issued by him were for short periods of time. Finally, he issued a policy to a mill company that was not reported until after the insured sustained a loss, seventeen days after the policy was issued. A special agent of the Philadelphia Underwriters came to defendant's office about that time and found him missing. The defendant was not seen at his office thereafter. During the investigation that followed, the appellant being absent, it appears that relatives of his stated to the special agent of the insurance companies that they were able and willing to pay as high as

$6,000 to reimburse the company, if such an amount should actually be found due to the companies. Proof of that fact, coupled with the claim that at no time could the parties making the offer get from the special agent a statement of the amount due, constituted, in effect, the offer of proof made by the appellant at the trial, the rejection of which is assigned as error. The offer was as if he had said: "I admit I have taken your money, but my relatives offered to give it back if you would tell them how much I had taken. Of course, you have no record of the policies I have issued, except such as I have reported, and I have not correctly reported the most of them, and some of them not at all." There was no question of good faith in his dealings that was suggested by the offer. Indeed, the record shows that the argument for him in the trial court was that, his relatives having "attempted to effect an adjustment and entered into negotiations for the purpose of making an adjustment, all of the criminal intent which would attach to the original taking of the money was absolutely obliterated." The law is to the contrary. Reparation, or simply the return of property stolen, when one finds his crime has been discovered, is no defense to a prosecution for the larceny. *State v. Craddick,* 61 Wash. 425, 112 Pac. 491.

The refusal of the court to give appellant's requested instructions numbered 1 to 5 has caused an assignment of error. They have received scant attention in the brief and oral argument on behalf of the appellant. They relate mostly to his erroneous theory of the law concerning the offer to compromise, and in other respects are incorrect expositions of the law applicable to the case.

There is no merit in the contention that a multiplicity of crimes is charged in the information. *State v. Boone,* 65 Wash. 331, 118 Pac. 46. Nor is there any

merit in the contention that the rights of the appellant were prejudiced because the proof covered transactions on behalf of two insurance companies. It was alleged and shown that his agency was on behalf of two companies doing business in the name of Philadelphia Underwriters.

The motions to discharge the defendant upon the state's evidence and for a directed verdict were properly denied. There was sufficient evidence under the rule as to the burden of proof in criminal cases to justify the verdict. Also, the motions for a new trial and in arrest of judgment were properly denied, neither being supported by any argument distinct from other views of the case already discussed.

Judgment affirmed.

PARKER, C. J., TOLMAN, FULLERTON, and BRIDGES, JJ., concur.

[No. 16950. Department One. March 23, 1922.]

THE STATE OF WASHINGTON, *Appellant*, v. ALFRED ANDERSON, *Respondent*.[1]

CRIMINAL LAW (382)—APPEAL—RIGHT OF STATE TO APPEAL. Under Rem. Code, § 1716, authorizing appeals from a final judgment and providing that no appeal shall be allowed the state in any criminal action except for error in setting aside the indictment or information, or in arresting judgment on the ground that the facts do not state a crime, no appeal lies from an order sustaining a demurrer to the information, where no judgment of dismissal was entered; and the fact that the state refused to amend or further plead does not convert the order into a final judgment of dismissal.

Appeal from an order of the superior court for Whatcom county, Hardin, J., entered August 26, 1921, sustaining a demurrer to an information. Appeal dismissed.

[1]Reported in 205 Pac. 378.

Loomis Baldrey, Frank W. Radley, and *E. D. Kenyon,* for appellant.

H. C. Barney and *Sather & Livesey,* for respondent.

PER CURIAM.—The trial court sustained defendant's demurrer to an information charging him with murder. The order, in addition to sustaining the demurrer, provided that "the prosecuting attorney is hereby permitted to file a new information, to which the state excepts and its exception is allowed." The plaintiff elected to stand on its information and refuses to file another, and has appealed to this court. The respondent now moves to dismiss the appeal because it is premature, and on the particular ground that it is from an order sustaining a demurrer to the information, no judgment of dismissal ever having been made or entered.

The appellant contends that the motion should be denied for two reasons; first, because the statute with reference to appeals expressly authorizes the state to appeal from an order sustaining a demurrer, and that it is not necessary that a judgment of dismissal be made in order to have the right of appeal; and second, if a judgment of dismissal is necessary upon which to base the appeal, then the fact that the state has refused to further plead and has elected to stand upon its information converts the order sustaining the demurrer into a judgment of dismissal.

Section 1716, Rem. Code (P. C. § 7290), is divided into seven subdivisions. The first subdivision provides for an appeal "From the final judgment entered in any action or proceeding, . . ." Subdivision 7 provides that ". . . an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the

ground that the facts stated in the indictment or information do not constitute a crime, or is some other material error in law not affecting the acquittal of a prisoner on the merits".

The part of subd. 1 which provides that appeals may be taken only from judgments which are final must be read in connection with that part of subd. 7 giving right of appeal to the state under certain circumstances. It can appeal only when the three matters set out in subd. 7 are involved, and then only when a final judgment has been entered. The statute does not authorize an appeal by the state from an order sustaining a demurrer to the information.

Appellant cites the case of *State v. Seifert*, 65 Wash. 596, 118 Pac. 746, as holding to the contrary. In that case we said that it involved an appeal "from an order . . . sustaining a demurrer to an information for murder in the first degree . . ." The court then proceeds to determine whether the demurrer was properly sustained. There is nothing in the opinion to show that there was no judgment dismissing the action, nor did the court in any respect discuss the question we are now considering. For these reasons, that case is in no regard controlling.

Nor can we hold that the fact that the state stood on its information and refused to file another is tantamount to a judgment of dismissal. It is perfectly manifest that the trial court did not intend its order to be a final judgment, and the parties to the action cannot make the judgment for the court.

For the reasons given, we are compelled to hold that the motion to dismiss the appeal must be sustained. It is so ordered.

[No. 17006. Department Two. March 23, 1922.]

MURRY JACOBS, *Appellant*, v. RALPH H. HOITT *et al.*, *Respondents*.[1]

HUSBAND AND WIFE (47-1)—COMMUNITY PROPERTY—ACQUIRED BEFORE MARRIAGE. The status of a bakery plant and business acquired before marriage by the use of separate funds and the pledging of separate credit is separate property.

SAME (51, 56)—COMMUNITY PROPERTY—CONFUSION OF FUNDS—PROFITS OF SEPARATE BUSINESS. Profits from the husband's separate business, increased by the labor and effort of husband and wife, constitute community property, to the extent of such earnings, where they can be separated; but money in the bank which it is impossible to segregate as to its sources, so confused that it cannot be apportioned, will be regarded as community property in view of the presumptions and favor of the law in which it is regarded.

SAME (51, 56). Where a husband had put $8,000 of separate funds into a bakery plant before marriage, and, after the community was created, $6,000 was added which could be presumed to be community property, eight parts of the present value of the plant can be said to be separate property and six parts, community property.

SAME (58, 60)—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE—SUFFICIENCY. The presumption that property, once separate, remains so, will not be overthrown by an alleged understanding between husband and wife, in the absence of any agreement between them to that effect, especially as against existing creditors.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered November 12, 1921, upon findings in favor of the defendants, in an action on promissory notes and to subject property to the lien of a judgment, tried to the court. Reversed.

Gates & Helsell, for appellant.

Ryan & Desmond, for respondents.

MACKINTOSH, J.—The appellant loaned to the respondent Ralph H. Hoitt, $5,300, prior to October 1, 1918, and in this action recovered judgment upon the

[1]Reported in 205 Pac. 414.

notes representing the loan. Ralph H. Hoitt was married to the respondent Elizabeth G. Hoitt on December 3, 1918. The loans by the appellant constituted separate debts of Ralph H. Hoitt. The only question in the case before us is as to the collectibility of the appellant's judgment from property which the respondents claim is community property, but which the appellant claims is the separate property of the husband.

The facts in regard to this property are as follows: In the year 1918, prior to his marriage, Ralph H. Hoitt had decided to engage in the bakery business under a then new baking system, and in order to undertake such business considerable capital was needed, which he obtained by borrowing it from his mother, the amount totalling $8,892.50. Of this sum he used $5,000 in purchasing the privilege of using the oven devices known as the "Chatterton system" and of conducting business under that name. He spent some $1,450 for ovens and mixers, paid $892.50 deposit on the lease, and the balance was used in furnishing counters, showcases, etc. Hoitt had theretofore been employed as a travelling salesman, earning less than $3,000 a year. With the aid of Mrs. Hoitt he so conducted his new business that it was very successful, so much so that by July 1, 1919, he repaid his mother the amount of her loan. He thereafter bought some $5,000 or $6,000 worth of new equipment, and out of the business paid the expenses of himself and his family, and had remaining in the bank as profits $4,118, which the appellant has garnished in this action.

The business for the three years before this trial made a profit of approximately $30,000. The greater portion of this, however, was made in the year 1919, for during that time the respondents had no competition in the use of the so-called "Chatterton system."

Subsequently some dozen competitors entered the business and the respondents' profits were greatly reduced.

It is the appellant's claim that the money in the bank and the bakery business, machinery, equipment and supplies should be held to be the separate property of the respondent Ralph H. Hoitt and subject to the satisfaction of the judgment secured by the appellant. The respondents' contention is that all of this property is community property.

The status of property is to be determined as of the date of its acquisition. If acquired before marriage, either by the use of separate funds or the pledging of separate credit, the property is separate property and remains so unless changed by agreement of the parties or operation of law, and we take it there is no distinction in this regard between real and personal property, though, of course, the evidence of a change of status of real property would, in ordinary circumstances, be more susceptible of positive proof than such a change in personal property.

The respondent Ralph H. Hoitt secured the property which he converted into the bakery business before his marriage by contracting a debt, and this was his separate obligation, and if the only property now owned by the respondents consisted solely of the property acquired by the use of the money borrowed from Hoitt's mother, it would be a simple matter to determine that that property was the separate property of Ralph H. Hoitt. *Hester v. Stine,* 46 Wash. 469, 90 Pac. 594; *Katterhagen v. Meister,* 75 Wash. 112, 134 Pac. 673; *In re Finn's Estate,* 106 Wash. 137, 179 Pac. 103; McKay, Community Property, § 209.

The rule is that the rents, issues and profits of separate property are separate property. Section 5915, Rem. Code (P. C. § 1432); *Hester v. Stine, supra.* The

complication arises in this case from the fact that the separate property did not produce, in and of itself, all of the profits which accrued to the business. These profits were increased by the labor and effort of the husband and wife, whose earnings after their marriage, of course, constituted community property. The difficulty here is to apportion those profits between the original separate property and the subsequent community earnings. The appellant contends that the work and efforts of the community should not be said to be worth more than $12,000 for the three years, for the reason that the husband had never earned more than $3,000 a year prior to undertaking this business, and that the balance of all of the profits should be held to have been the result of the separate investment, and points to the fact that it was really the possession of an exclusive right to use a new system of baking that resulted in the profit from the undertaking, as was demonstrated by the fact that, when competition arose, the profits were materially decreased, although the labor and effort of the members of the community were the same as they had been when the profits were larger. This argument does not strike us, however, as being convincing and we do not believe that the profits can be separated on that basis. It would seem to us that it is not only equitable, but is supported by the facts, to hold that so much of the profits, at least as they were represented by the amount which Hoitt repaid to his mother, were profits from the original investment, which would confirm the original investment as separate property, although the decisions would seem to indicate that the paying off of separate obligations by community funds would not change the status of the property, acquired by the creation of the obligation, from separate to community property.

In regard to the money in the bank, it is impossible to segregate that as to its sources. Its separate and community natures have become so confused that the court cannot apportion them, and the favor with which community property is regarded and the presumptions in favor of it are such that we must agree with the trial court that these funds in bank are the property of the community and not subject to the appellant's judgment.

Regarding the plant and its equipment, the testimony is that the original investment of separate funds going into it amounted approximately to $8,000, and that money put into it after the creation of the community to add to the plant and equipment amounted to some $6,000. Presuming that this amount of profit from the business was a portion of that which was the result of the work and efforts of the community, we arrive at the conclusion that eight-fourteenths of the value of the bakery business, equipment, machinery and supplies are the separate property of the respondent Ralph H. Hoitt. The testimony shows that this property, which includes the right to use the "Chatterton system", is now worth approximately $25,000. Eight-fourteenths of this property is amenable to the appellant's judgment.

Respondents make some argument that, by agreement between Hoitt and his wife, what may have been his separate property was converted into property of the community, and rely upon the case of *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409, which reviews the many previous decisions of this court on the subject. There is no question that community may be changed into separate property and separate into community property, but we find nothing in the evidence to show that any agreement was ever made between the husband and wife as to the status of the bakery business. Further-

more, this argument could hardly be effective to deprive the appellant, who was an existing creditor at the time, of the right to collect that debt from what was then separate property. *Marsh v. Fisher,* 69 Wash. 570, 125 Pac. 951; *Lanigan v. Miles,* 102 Wash. 82, 172 Pac. 894. The presumption is that property which was once separate maintains that character until there is positive testimony to the contrary. *Sherlock v. Denny,* 28 Wash. 170, 68 Pac. 452; *Guye v. Guye,* 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186.

The respondents cite the case of *In re Buchanan's Estate,* 89 Wash. 172, 154 Pac. 129, and place reliance upon it in support of their contention, arguing that the decision in that case would force the affirmance of the judgment here. A reading of this case, however, does not convince us that that argument is sound. The court there held that what were contended to have been the profits and gains of separate property were not the rents, issues and profits of that property, but were the result of the personal efforts of one of the spouses, although the separate property in a measure contributed to such gains, and held:

"But where a small original investment of separate funds is united with the personal efforts of a member of the community, and therefrom profits and gains to the extent of some twenty-fold are returned, the property being personal and undergoing many changes, we know of no other rule by which the question of such gains being community or separate property can be determined other than by taking into account the relative contributing force of the original investment and the personal efforts of a member of the community. The authorities do not furnish us much light upon this question, in so far as decisions directly in point are concerned."

As we read it, that decision merely holds that, in the case before the court, it was impossible to say

with any degree of certainty what proportion of the income of the community had been contributed by the original separate property. In the case before us, although the exact ratio between the return from the separate property investment and the return from the community efforts is not subject to mathematical determination, yet we are satisfied that at least the amount which we have found was used in paying off the separate indebtedness was the earning from the separate property, and the division between the separate and community nature of the present business is subject to what appears to us a mathematical determination. In the *Buchanan* case, the original separate investment was so insignificant a contribution to the then value of the property that it could be ignored. Here we have a substantial capital investment which was separate property. While in the *Buchanan* case there was a commingling of separate and community property which made it impossible to segregate them, here there is no such commingling of the plant and business as to render segregation impossible.

The judgment below must be reversed, in so far as it attempts to relieve the franchise, equipment and bakery business from subjection to appellant's judgment by declaring it community property.

PARKER, C. J., HOLCOMB, MAIN, and HOVEY, JJ., concur.

[No. 16909. Department Two. March 24, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. WESLEY WARDEN *et al.*, *Appellants*.[1]

BAIL (6, 7)—FORFEITURE—DISCHARGE—INSUFFICIENT COMPLAINT. A bail bond given in compliance with Rem. Code, § 1957, conditioned for the principal's appearance in the superior court to answer to the "charge" of rape, is not discharged by reason of the fact that the information was held insufficient on demurrer, where the court permitted the filing of an amended information charging the same offense.

SAME (6)—FORFEITURE—NOTICE TO APPEAR. Under Rem. Code, § 2231, judgment of forfeiture of a bail bond may be entered where "due notice was given" the defendant to appear for arraignment on a certain day, and he failed to do so.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered March 24, 1921, upon forfeiting a bail bond. Affirmed.

P. D. Smith, for appellants.

Sam R. Sumner and *Frank Lebeck*, for respondent.

MACKINTOSH, J.—A complaint was filed in the justice court against Wesley Warden, charging him with the crime of rape, and he was bound over to the superior court for trial. He gave a bond, signed by himself as principal, and the other appellants in this case, as sureties, the material portion of the bond being as follows:

"The condition of the above obligation is such that, whereas, an order has been made on the 26th day of February, 1921 . . . that Wesley Warden be held to answer and appear for trial before the superior court of the state of Washington for Chelan county upon a charge of carnal knowledge of a female child, upon which he has been admitted to bail in the sum of

[1]Reported in 205 Pac. 372.

$1,500.00, and which charge is pending in said court against him, in behalf of the State of Washington.

"Now, therefore, if the said Wesley Warden shall appear and answer the charge above mentioned in said superior court and at whatever time it may be set for hearing by the court before which it is pending, and shall at all times hold himself amenable to the orders and process of the court, and if convicted will appear for judgment, and render himself in execution thereof, then this obligation to be null and void, and of no effect; otherwise to be and remain in full force and virtue."

The prosecuting attorney then filed in the superior court an information in the same language as that contained in the complaint, to which a demurrer was sustained for the reason that the information failed to state some of the elements laid down in the statute necessary to constitute the offense. The court, upon sustaining the demurrer, at the request of the prosecuting attorney, allowed the filing of an amended information, which was filed, and notice was given to the defendant to appear in court on March 24, 1921, to be arraigned. On that date the defendant did not appear, though called under direction of the court, whereupon the prosecuting attorney moved the court for a forfeiture of the defendant's bail. The motion was granted and a judgment was entered against the defendant and his sureties in the amount provided in the bond. From that judgment, this appeal has been taken.

It is first urged that there is no liability on the bond for the reason that the complaint in the justice court and the first information filed in the superior court were defective, and that the bail bond did not attach to the amended information.

The bond was given in compliance with the requirements of § 1957, Rem. Code (P. C. § 9603), which pro-

vides that the defendant shall appear in the superior court to answer "said charge." The bond itself provided that "the said Wesley Warden shall appear and answer the charges above mentioned in the said superior court." It is not necessary to set forth in the bond the language of the complaint or information. The obligation of the bondsmen was to see that the defendant appeared in court and answered to the charge, which was that of rape, and they are not discharged on their obligation until the defendant has been released from that charge. The obligation was not to answer the complaint actually on file, but to answer to the charge of rape, whether presented by the complaint or subsequent information properly alleging the crime.

It is argued that the opinion of this court in *State v. Bryant,* 90 Wash. 20, 155 Pac. 420, establishes a different rule. In that case the court had held a criminal complaint insufficient, and the state appealed from that order, and it was urged that the court should have forfeited the defendant's bail because of the fact that he was a fugitive from justice. This court said, however:

"If the court was right in holding that the information was insufficient . . . it is plain that it was right in refusing to forfeit the bail; for, where a bail bond is given upon a criminal charge and the information is insufficient, or if the defendant is acquitted, bail cannot be forfeited, . . ."

In this case, although the complaint and the original information were held to be insufficient, there was a sufficient information upon file, which the bond obligated the defendant to answer, and it was upon this that the defendant had been notified to appear for arraignment, so that the facts of this case place it without the rule established in the *Bryant* case.

It is next suggested that no order of the court had been made directing the appellant to appear. We are bound, however, by the statement of the trial court in his order, which is that "due notice was given the defendant above named to appear in this court on this day for the purpose of arraignment." He having not appeared and having been regularly called, under authority of § 2231, Rem. Code (P. C. § 9347), the court was empowered to enter judgment against him and his sureties. We see no error in this case. Affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16888. Department Two. March 24, 1922.]

LOS ANGELES OLIVE GROWERS ASSOCIATION, *Appellant*, v. PACIFIC GROCERY COMPANY, *Respondent*.[1]

SALES (113, 117, 165)—WARRANTY OF FITNESS—BREACH—WAIVER—ACCEPTANCE—DAMAGES. The purchaser of canned tomatoes from the manufacturer who accepts the goods on inspection may nevertheless recover for latent defects through improper canning for breach of implied warranty that the goods were fit for human consumption and capable of being kept the customary time.

SAME (117)—WARRANTY—WAIVER OF BREACH. Under a manufacturer's sale of canned tomatoes, providing that claims for "swells" must be made within six months, and all other claims within ten days from the receipt of the goods, the ten-day provision relates only to patent defects, where all damaged cans would first swell, and the defects could not be discovered within the ten-day period; since an unreasonable limitation for the discovery of latent defects will not protect the seller.

TRIAL (10)—RIGHT TO OPEN AND CLOSE. In an action on contract, where the complaint was admitted and the sole issue was on a counterclaim, the defendant had the burden of proof and was entitled to open and close.

EVIDENCE (59)—RELEVANCY—SIMILARITY OF CONDITIONS. Upon an issue as to damages for breach of implied warranty in the sale of

[1]Reported in 205 Pac. 375.

canned tomatoes, which were apparently in good condition when delivered but spoiled within six months, it is proper comparison to admit evidence that other tomatoes were kept in the same place during the same time and did not deteriorate; also to exclude testimony that other goods packed by the seller at the same time but not having similar storage had not developed trouble.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 14, 1921, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Louis A. Merrick, for appellant.

Black & Black, for respondent.

HOVEY, J.—Appellant sued the respondent upon an account for goods sold, amounting to $312.50. The respondent answered, admitting the indebtedness, and counterclaimed for damages sustained through the purchase in December, 1918, of one thousand cases of tomatoes, two dozen to the case. The amount claimed as damages was $1,728, and after allowing credit for the sum due plaintiff, judgment was asked for $1,415.50. The case was tried to a jury, and a verdict rendered in favor of the respondent for $1,134.25, which was thereafter reduced by the judge to $1,108.70.

Respondent paid the purchase price of the tomatoes in January shortly after they were received. At that time it made some examination of the goods, opening cans from several cases, and found them all to be in good condition, and so wrote appellant. Later on defects were discovered, and in June respondent wrote a letter to appellant advising them of the situation. The goods were sold under a written contract which provided that all claims for swells must be made by July 1, and all other claims within ten days of the receipt of the goods. The evidence tendered showed that,

while the tomatoes appeared all right for some time after delivery, some of the cans later developed swelling, and others then showed very small holes through which air could penetrate, and in some cans the contents were discharged through these holes. Upon opening such cans they were found to be rusted upon the inside. Five hundred and seventy-six cases, being all remaining on hand, were affected. The tomatoes were condemned by the state food inspector, and a chemical expert from the Washington university examined them and testified as a witness. The testimony clearly shows that the tomatoes were unfit for food, and while it is not clear as to what caused the trouble the evidence does show that the defect was a latent one and probably due either to careless canning or defective containers. It was shown that the tomatoes were properly stored and kept after their receipt in Everett, and that other tomatoes, kept under exactly the same conditions and during the same time, were all right, and that tomatoes properly canned will keep for at least five or six years.

The principal question in the case is the right of respondent to recover after having accepted and paid for the goods. Under the circumstances, respondent would be denied recovery if the defects were patent, but in the case of a latent defect, the rule is different. The defect in this case could not be discovered until time had elapsed.

The appellant in this case was a manufacturer, and that brought to this sale an implied warranty of fitness for purpose intended. *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653, and note; *Gleason Co. v. Carman*, 109 Wash. 536, 187 Pac. 329. In this case the implied warranty

was that the goods were food fit for human consumption, capable of being kept the customary time.

There is some divergence in the authorities as to how far a purchaser is bound in case of patent defects, but in case of a latent defect, even the courts which rule most strictly against the buyer follow the doctrine that he is not bound by the mere acceptance of the goods and payment for the same.

"The second exception to the rule, that acceptance of title operates as satisfaction, arises where the defect in the goods is one which cannot be discovered by inspection. In such a case, whether the seller's breach of promise is of an express warranty, an implied warranty, or, under the terminology of the court, of a promise not properly classified as a warranty, the buyer may recover damages." Williston, Sales, § 489.

Among the cases cited in support of the text, the following are in point in this case. *Miller v. Moore,* 83 Ga. 684, 10 S. E. 360, 20 Am. St. 329, 6 L. R. A. 374; *Buffalo Barb Wire Co. v. Phillips,* 67 Wis. 129, 30 N. W. 295; *Zabriskie v. Central Vt. R. Co.,* 131 N. Y. 72, 29 N. E. 1006; *Bell v. Mills,* 78 App. Div. 42, 80 N. Y. Supp. 34; *White Mfg. Co. v. De La Vergne Refrigerating Mach. Co.,* 84 N. Y. Supp. 192.

It is contended, however, that under the contract in this case the buyer is precluded from making claims for damage except in the manner therein described. We think, however, that here the ten-day provision relates only to patent defects. The provision as to swells was complied with. Under the testimony, it would seem proper to classify all damaged cans as swells, as the testimony showed that the history of the cans is that they would first swell and then, as the holes got large enough to let the gas and contents out, they would resume their former position. But even if it be considered that some of the damage is not in-

cluded within that term, it was all damage from a latent defect and not within the terms of the contract. "Where, however, the defects are latent and such as are not readily discoverable by inspection, no unreasonable limitation as regards the time for inspection will protect the seller." 23 R. C. L. 1434; *Gaar, Scott & Co. v. Hill,* 20 Ky. Law 1325, 49 S. W. 202; *Adams Mach. Co. v. Turner,* 162 Ala. 35, 50 South. 308, 136 Am. St. 28; *Bell v. Mills, supra; American Hoist & Derrick Co. v. Frey,* 127 La. 183, 53 South. 486. The time which this defect took to assert itself fixed the reasonableness of the time for complaint in this case. We conclude that there was ample testimony to sustain the verdict of the jury.

Error is also predicated upon the fact that the court ruled that the burden of proof was upon respondent and gave it the opening and closing of the trial. This is based upon the fact that there was a denial of a formal allegation as to incorporation in the answer of respondent. Upon the trial, however, no issue was made as to the claim held by appellant, but the contest was waged solely upon the counterclaim of the respondent and it was entitled to open and close.

There are forty-two assignments of error, most of them relating to the admission and rejection of testimony, none of which we deem to merit discussion beyond what we have already said, except one.

Appellant objected to the testimony as to the condition of tomatoes kept in the same place and during the same time as those in controversy, and the refusal of the court to permit it to introduce testimony to the effect that other goods packed by it at the same time had not developed trouble. We see no error in this. Goods kept under exactly the same conditions would be a fair basis for comparison, while goods kept under al-

together different conditions would not afford the same basis.

Under the view which we take of this case, it is not necessary to consider the effect of the National Food and Drug Act upon the sale.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16944. Department Two. March 24, 1922.]

ANTHONY DELTHONY, *Appellant*, v. STANDARD FURNITURE COMPANY, *Respondent*.[1]

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—REMEDIES OF WORKMAN—"DELIBERATE INTENT"—STATUTES. Under Rem. Code, § 6604-6 [Rem. Comp. Stat., 7798] allowing a servant, compensated under the workmen's compensation act, to maintain an action against the master if the injury resulted from "deliberate intention" of the master to produce the injury, there must be a specific intent, not merely carelessness or negligent use of an agency after knowledge on the part of the master that it was dangerous and unsafe.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 28, 1921, upon granting a nonsuit, dismissing an action in tort. Affirmed.

Walter G. Kienstra, for appellant.

J. Speed Smith and *Henry Elliott, Jr.*, for respondent.

MAIN, J.—The plaintiffs brought this action to recover for personal injuries for which he claimed the defendant should respond in damages. At the conclusion of his case, the defendant challenged the legal

[1]Reported in 205 Pac. 379.

sufficiency of the evidence and moved for a directed verdict. This motion was sustained and a judgment entered dismissing the action, from which the plaintiff appeals.

The respondent conducts a general retail furniture business in the city of Seattle, occupying a seven story building at the corner of Second avenue and Pike streets. The appellant was employed as an electrician and general maintenance man about the building. On April 5, 1909, while he was in the performance of his duties and near a boiler which was installed in the basement of the building, he was seriously injured by the explosion of the boiler. After the injury, he filed a claim with the industrial insurance commission, and as compensation for the injuries which he sustained, was awarded and received the sum of $777.

Notwithstanding this award, the appellant claims the right to recover in this action against the respondent, and founds his claim upon Rem. Code, § 6604-6 (P. C. § 3473-6) [Rem. Comp. Stat., § 7798], which provides, among other things, that, if injury to a workman results from "deliberate intention of his employer to produce such injury, or death, the workman, ... shall have the privilege to take under this act, and also have cause of action against the employer." It will be noticed that, before the appellant would be entitled to recover, it would be necessary for him to allege and prove that his injury was the result of a deliberate intention of the respondent to injure him. There is no evidence in the record showing, or tending to show, any such deliberate intention.

It may be admitted that, if the question were one as to whether the respondent was negligent in the manner in which it maintained the boiler, the case would present a question for the jury. The appellant con-

tends that, if the respondent knew of the dangerous and unsafe condition of the boiler, and knowing this fact, if it is a fact, maintained the boiler in a dangerous and unsafe condition, that, as a matter of law, it would be held to have been deliberately intended to produce the injury. But this proposition cannot be sustained. The language of the act is "deliberate intention," and evidence of negligence fails to show such intention. In *Jenkins v. Carman Mfg. Co.*, 79 Ore. 448, 155 Pac. 703, the supreme court of Oregon had this question before it. The act of that state provides that, if injury to a workman results from the "deliberate intention" of the workman himself to produce the injury, there would be no right to take compensation under the act. The language there used, "deliberate intention," is the same as the language of the section of the statute upon which the appellant predicates his right to recover. Construing this language, it was there said:

"We think by the words 'deliberate intention to produce the injury' that the lawmakers meant to imply that the employer must have determined to injure an employe and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross."

The cases cited by the appellant do not support the proposition for which he contends. One of them, *Wick v. Gunn*, 169 Pac. (Okl.) 1087, tends to support the position which we here take, which is the same as that of the Oregon court.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16826. Department One. March 24, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER COLAGINO, *Appellant*.[1]

HOMICIDE (83, 90-1)—FIRST DEGREE—QUESTION FOR JURY. The finding of murder in the first degree on conflicting evidence, was a question for the jury, where it appears that, although the defendant may have killed deceased in anticipation of trouble when the deceased called on him relative to accusations defendant had made against deceased's son, where his defense of a killing in self-defense, after a struggle, is discredited and appears to have been manufactured.

CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—REQUESTS. It is not error to refuse to give requested instructions in the language proposed, where they were covered in other instructions as favorable to the accused.

SAME (452). An instruction upon the subject of the flight of the accused is not prejudicial where, as a whole, the meaning was clear, and the jury were left to say whether the evidence justified the conclusion that accused had fled or attempted flight.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 11, 1921, upon a trial and conviction of murder. Affirmed.

John F. Dore, for appellant.

Malcolm Douglas and *John D. Carmody*, for respondent.

FULLERTON, J.—The appellant, Peter Colagino, was informed against for killing one Aleck McGibbon, the charge being murder in the first degree. He was convicted as charged, the jury, however, finding by a special verdict that the death penalty should not be inflicted. On the verdict of guilty, he was adjudged guilty and sentenced to imprisonment for life. From the judgment and sentence, he prosecutes the appeal.

[1]Reported in 205 Pac. 413.

It is contended, first, that the evidence did not justify a verdict for any higher degree of crime than murder in the second degree. The salient facts are these: The appellant was in the employ of a railroad company, his employment keeping him away from his home for the greater part of the day. He lived alone in a house owned by himself, situated upon rented land. On a part of this land he maintained a chicken yard, and another part he devoted to a vegetable garden. McGibbon lived with his family on an adjoining tract of land, his family consisting of a wife and seven sons. The relations existing between the appellant and McGibbon and his family were outwardly friendly. Shortly prior to the time McGibbon was killed, the appellant complained to Mrs. McGibbon that his chickens and vegetables were being stolen. He did not complain to her that he thought her sons were parties to the thefts, although he did so complain to others of his neighbors, and also to the police. The fact that he was making these charges was learned by Mrs. McGibbon on the day the killing occurred. When her husband came home at about four o'clock on that day, Mrs. McGibbon told him of the appellant's accusations, and he said to her that he would talk to the appellant about the matter. The appellant reached home on that day shortly after four o'clock, and Mr. McGibbon, possibly a half hour thereafter, started in the direction of the appellant's house. The state's evidence shows that he was shot and killed by the appellant as he was approaching the house, and before he had reached it. The killing was done while it was yet daylight, and while persons could be recognized at considerable distances.

The appellant's story, told at the time of his arrest and on the witness stand, is that McGibbon, with two

other persons whom he did not recognize, came and knocked on his door, and attacked him when he opened it to admit them, and that he shot McGibbon in self-defense. He also exhibited to the arresting officers and others, in corroboration of his story, marks on his throat apparently made by the hands of some person. The evidence, however, is all but overwhelming that these marks were self-inflicted, and a further effort to manufacture evidence appears from the fact that a shot was fired from the revolver with which McGibbon was killed, from the outside of the house through the door into the inside, the door being the one which McGibbon was approaching when killed.

The room in which the appellant testifies the assault on him was made bore no evidence of a struggle having taken place therein. There were a number of persons living in the vicinity who were attracted to the place by the shooting, yet no one saw the alleged companions of McGibbon, and certain of them, who saw McGibbon approach the house, testify positively that he was alone. There is some evidence that the appellant contemplated flight, as he left the place immediately after the shooting, putting out the light that was earlier seen burning therein and locking the doors of the house. Later, however, he appeared at the house of a county employee, announced that he had killed McGibbon, and there awaited until he was taken in charge by deputies from the sheriff's office.

It seems to us clear that there is here sufficient evidence to warrant the verdict returned by the jury. It may be, as the appellant's learned counsel argues, that there is no very apparent motive for the killing, and that different deductions can be drawn from the evidence with regard thereto. But it was the exclusive privilege of the jury to draw these deductions, and if

there are any such that will sustain the verdict, it is sufficient in so far as it concerns the appellate court. Clearly, we think, the jury could reasonably and justly draw the conclusion that the appellant believed that McGibbon had learned of the accusations he had made against McGibbon's sons, that McGibbon was coming to his house because thereof, and that he shot and killed him in anticipation of trouble thereover. A killing under such circumstances is murder in the first degree. A due regard for the sacredness of human life will not permit the courts to hold, as matter of law, that the killing of a human being because of mere anticipation of trouble, forbids the finding that the killing is of no higher degree of crime than murder in the second degree.

The second assignment of error relates to the refusal of the court to give certain requested instructions. These relate to the appellant's theory of self-defense. But we find, on examination of the court's charge to the jury, that they were covered by the court in language fully as favorable to the appellant as the law warrants. There are courts which maintain the principle that a defendant is entitled to have the jury instructed in the language of his request, if the request is appropriate to the defendant's theory of the case and is otherwise unobjectionable, but this court has always refused to recognize the doctrine. Here, the court may charge in its own language, and error cannot be predicated thereon merely because the language used by the court does not follow literally the language of the request.

The court gave an instruction on the question of flight. As a preliminary thereto it stated to the jury, "some evidence has been introduced of the flight of this defendant immediately or soon after the act al-

leged as the crime with which the defendant is here charged''; this the court followed with further instructions concerning the effect to be given by the jury to the fact of flight, if they found the fact established; saying to them, in substance, that it was their privilege to determine from the evidence whether the defendant had or had not fled from the scene of the act charged as the crime. Error is alleged upon the quoted portion of the charge, but we think it not reversible error. While the language used is perhaps not the most happy that could have been chosen to express the evident thought the court sought to convey, the instruction as a whole makes the meaning clear, and, in our opinion, conclusively shows that the court did not thereby trench upon any of the prerogatives of the jury. The jury were left to say whether the evidence justified the conclusion that the appellant had fled or had attempted flight, and were instructed to consider the evidence as bearing upon the appellant's guilt only in the case they did so find.

Other errors assigned merit no special consideration.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 17031. Department One. March 24, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. S. D. LLEWELLYN, *Appellant*.[1]

INTOXICATING LIQUORS (53)—SEARCHES AND SEIZURES—WITHOUT WARRANT—PROPERTY SUBJECT. In a prosecution for unlawful possession of intoxicating liquor, seized by officers without a warrant, a motion to suppress the evidence is properly denied, where the officers entered the place when the door was opened to admit one of the general public, it required no search to find the liquor, which was in the actual, open, physical possession of the defendant, under circumstances showing that he had been making unlawful use of it.

ARREST (6)—WITHOUT WARRANT—AUTHORITY. Officers may arrest without warrant for a misdemeanor committed in their presence.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered July 23, 1921, upon a trial and conviction of the unlawful possession of intoxicating liquor. Affirmed.

Dan Pearsall, for appellant.

Austin M. Wade, for respondent.

FULLERTON, J.—The appellant, Llewellyn, was convicted in a justice court of Grays Harbor county of the crime of unlawfully having in his possession intoxicating liquor, and from the judgment of conviction appealed to the superior court of that county. Prior to the time the cause was set for trial in the superior court, he filed a petition in that court, entitled a petition for the exclusion and return of evidence, in which he alleged that certain police officers of the city of Aberdeen had, without a search warrant or other authority, broken into and entered his place of business, after the same had been closed for the day, and had illegally and unlawfully taken therefrom a pitcher,

[1]Reported in 205 Pac. 394.

some drinking glasses, and a bottle containing some form of liquid; that, unless restrained by the court, the officers would testify as to what occurred in the place after their unlawful and illegal entry therein; and that the prosecution would introduce on the trial of the cause the pitcher, glasses and liquid as evidence of the petitioner's guilt, unless restrained by the court. The prayer of the petition was that the pitcher, glasses and liquid be returned to him, and that the police officers be restrained from testifying as to anything that occurred in the place after their entry therein.

The state, answering the petition, admitted the seizure of the pitcher, glasses and liquid, averring the liquid to be intoxicating liquor, commonly known as moonshine whiskey, but denied that the officers seizing the same broke into the building, or that they otherwise unlawfully entered, averring that they entered as of right.

At the time the cause was called for trial, the question arose whether the issue made by the petition should be first tried, and the court, after hearing the statements of counsel and finding a disagreement between them as to the facts, announced that it would proceed with the trial and reserve the question for determination after the evidence thereon had been introduced.

At the hearing it developed that the appellant, Llewellyn, conducted a place where cigars, candies and soft drinks were sold. The officers testified that they were attracted to the place, after it had been closed for the day, by a light burning therein; that they walked over to the place and discovered a number of men apparently much interested in something that was taking place on the bar over which the soft drinks were usually served; that at about that time a person

came up the street and knocked on the entrance door of the building, and that they then moved down to the door; that the door was opened from the inside and that they went in ahead of the person knocking; that as they entered the building the person opening the door discovered that they were officers, and sought to warn the men at the bar by hallooing, "look out"; that the men were shaking dice, having considerable sums of money stacked in front of them, and were so intent upon the game as to give no heed to the warning until they were upon them; that, when the men discovered their presence, certain of the players grabbed the money, and that the appellant grabbed a pitcher which was on a draining board behind the bar; that one of the officers reached for the pitcher at the same time and succeeded in getting hold of it; that a struggle ensued between the officers and the appellant for its possession, resulting in the end in the success of the officers. One of the officers did not see what the pitcher contained prior to the commencement of the struggle for its possession, but the other testified that it was more than half full of a whitish liquid, nearly all of which was spilled in the struggle. Both testified that the small quantity remaining in the pitcher proved on subsequent examination to be intoxicating liquor. They also testified that small quantities of the same liquor were found in the drinking glasses which were on the bar. The appellant, together with the other occupants of the building, were then arrested and taken to the police court, the appellant being charged with unlawfully having liquor in his possession, and the other persons with gambling. The officers, after making the arrests, seized and took to the police court the pitcher and glasses, with their contents, where the contents, for preservation as evidence, was poured

into a bottle and the bottle sealed. The officers testified that they made the arrests without a warrant of arrest, and that they had no search warrant authorizing them to search the appellant's place of business.

At the trial the pitcher, glasses and bottle with its contents were permitted to be introduced in evidence by the state, over the objection of the appellant, and the court refused the appellant's motion to suppress or withdraw from the consideration of the jury the evidence given by the police officers.

The appellant first contends that the entry of the officers into his place of business was an unlawful entry, and that in consequence the seizure of the articles named was an unlawful seizure, and should have been for these reasons excluded from the consideration of the jury. He cites and relies upon the case of *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390. But we think the rule of the case without application. There the defendant was arrested while in an automobile on the public streets of a city, without a warrant of arrest, and for a cause having no better foundation than the mere suspicion of the officer that the person arrested was violating the law. After the arrest, a search was made of the automobile and certain intoxicating liquor found therein was seized. This was held to be an unlawful search and seizure, and, following certain recent cases of the supreme court of the United States, it was held that the liquor seized could not be introduced as evidence against the person arrested.

Here the facts are widely different. The entry of the officers into the place of business of the defendant was not unlawful. They did not break and enter. The door was opened on the direction of the defendant and they walked in through the opened doorway. It

is true, without doubt, that the door was not opened for the admission of the officers, but it is equally true that they were not forbidden to enter. The defendant was then admitting to the place members of the general public. Already there were a number therein, and the officers were admitted when the door was opened to admit another. It would be extending the doctrine of the cited case beyond all reasonable limit to hold that it ruled this entry to be unlawful. Once in the place, the officers were justified in taking cognizance of the fact that a crime was being committed by the defendant. The evidence thereof was before their very eyes; it took no search to find it. Nor is it a valid objection to say that the offense which the defendant was then committing was a misdemeanor. Arrests for misdemeanor may be lawfully made without a warrant when the offense is committed in the presence of the arresting officer. And here the offense was so committed. When the officers first discovered the intoxicating liquor, it was in the actual, open, physical possession of the defendant, and the circumstances were such as to show that he had been making an unlawful disposition of it. Having the lawful right to arrest the defendant, they could lawfully seize and take with them the evidence found in his immediate possession which tended to show his guilt.

The second contention, namely, that the court erred in permitting the officers to testify is answered by what we have said in answer to the first. It is not to be understood, however, that were we to hold that the officers entered the building unlawfully, and the seizure wrongful, we would hold that the officers would be precluded from testifying to the things they observed while in the building; this question we leave until it properly arises.

Finally, it is urged that the court erred in refusing to give the jury certain instructions requested by the defendant. But we find no error in this. While the instructions may have been appropriate to the defendant's theory of the applicable principles of law, they are not so within the perview of these rules as we have interpreted them.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16920. Department One. March 27, 1922.]

EDWARD HULLIN *et al.*, *Respondents*, v. SEATTLE TAXICAB COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS (379, 383, 392)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Under an ordinance giving the right of way to vehicles on the right in the case of simultaneous approach to a street intersection, it is not error to instruct that a vehicle on the right, which admittedly was first to reach the intersection, would have the right of way; and it was not error to refuse an instruction that such driver would be guilty of contributory negligence precluding a recovery if on the wrong side of the street, where it omitted the element that such fact must have contributed to the accident.

APPEAL (445)—HARMLESS ERROR—ARGUMENT OF COUNSEL. Error cannot be predicated upon an improper remark by counsel in addressing the jury, which was in answer to an equally improper remark of opposing counsel, where the court immediately instructed the jury to disregard it.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 20, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages sustained through an automobile collision. Affirmed.

[1]Reported in 205 Pac. 403.

Bogle, Merritt & Bogle, for appellant.

Fred W. Catlett, for respondents.

TOLMAN, J.—Respondents sue to recover for damages to an automobile truck owned by them, sustained in a collision with a taxicab belonging to appellant, alleged to have been caused by the negligence of the driver of the taxicab. From a verdict against it in the sum of $266.49, and a judgment thereon, appellant brings the case here by appeal.

It appears that, at the time in question, respondents' truck was proceeding westward on Spring street, in the city of Seattle, toward the intersection of that street with Railroad avenue. Spring street, to the east of Railroad avenue, is used largely by commission merchants. Both sides of the street ordinarily are, and at the time in question were, occupied by trucks and vehicles backed up to the curb, so that one driving a truck through must necessarily drive at about the center of the street. Respondents' truck, heavily loaded, was so driven along the center of Spring street. Railroad avenue, which runs north and south, is occupied by a number of lines of railroad track, is paved only with plank laid lengthwise, and vehicular traffic is confined to the portions of the street not at the time used or occupied by moving trains or stationary cars. Appellant's taxicab was proceeding north toward Spring street on Railroad avenue, from three to five feet west of a line of box cars which extended all the way to Spring street and cut off the view of each of these drivers of the other. Respondents' truck was admittedly the first to reach the intersection, and also admittedly encroached upon the left half of Spring street, the extent of such encroachment being sharply disputed. It was proceeding very slowly on account

of the character of its load, and the roughness of the street caused by the railroad tracks over which it was passing. As it proceeded due west sufficiently to permit the drivers of the two vehicles, looking past the box cars, to see each other, the appellant's taxicab was still distant from the intersection 65 feet, and traveling in excess of 40 miles per hour, according to the testimony of the driver of the truck, or 30 feet and traveling at the rate of 18 or 19 miles per hour, according to the testimony of the taxi driver. The testimony regarding the unsuccessful efforts of each of them to then avoid the collision does not clarify or change the questions now presented, and need not be detailed. It is first urged that the trial court erred in giving an instruction, as follows:

"The ordinance provides that drivers approaching a street intersection shall look out for and give right-of-way to vehicles on their right simultaneously approaching a given point.

"The proper construction of this ordinance is that a vehicle entering a street intersection first has the right-of-way over one subsequently entering the intersection, but if they enter the intersection simultaneously or at the same time, then it will be the duty of the driver of the vehicle having the other vehicle on his right to give the right-of-way to the other vehicle.

"In this case, if you should find that the plaintiffs' truck and defendant's taxicab entered the street intersection simultaneously, then it will be the duty of the driver of the taxicab to give the right-of-way to the truck, as the truck would be on his right as he entered the intersection.

"If you should find from the evidence that plaintiffs' truck had the right-of-way, then that would impose upon the driver of the taxicab the necessity for continuous observation in the endeavor to avoid collision; and it is the duty of the one approaching from the left to approach at a speed sufficient to permit the

other machine to cross the point of intersection in front of him."

It is urged that by this instruction the jury was permitted to determine which vehicle first entered the intersection. It was an admitted fact that the truck entered the intersection far in advance of the taxicab, but of this, assuredly appellant cannot complain. However, the main contention is that this instruction cast upon the appellant the duty of giving the right of way to, and of continuous observation in an endeavor to avoid collision with, the truck, which was admittedly to some extent on the wrong side of the street in violation of the city ordinance, and whose driver, it is contended, therefore, was guilty of negligence *per se*. In other words, that this instruction gave to a vehicle traveling on the wrong side of the street the right of way over a vehicle approaching from the left. The instruction is not as happily worded to fit the facts of the case as it might have been; but since we have frequently held that it is not negligence *per se* to drive on the wrong side of the highway (*Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106; *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876), and also that the mere presence of a vehicle on the wrong side of the street will not sustain a verdict or constitute contributory negligence, unless it is shown to have been the proximate cause of the injury (*Peterson v. Pallis, supra; De Lys v. Powell-Sanders Co.*, 90 Wash. 31, 155 Pac. 407; *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942), we must hold that, under the facts here shown, it was for the jury to say whether the position of respondents' truck was the proximate cause of or contributed materially to the injury. There was evidence, disputed it is true, from which the jury may have found in favor of re-

spondents upon one or more of the following questions: (a) Would the accident have happened substantially as it did, and solely because of the excessive speed of the taxicab, if respondents' truck had been wholly upon the right side of the street? (b) If the taxicab had approached the intersection at a speed within the limit fixed by the city ordinance, could it have been stopped before reaching the point of collision, or slowed down sufficiently to have permitted the truck to pass in safety beyond the danger point? (c) If the taxicab had been traveling at a lawful rate of speed, could it, after the danger became apparent, have been turned to the right so as to have passed safely between the truck and the standing freight cars, so as to proceed easterly upon Spring street, thus pursuing the course which its driver testified he intended to follow? An affirmative answer to any of these questions would necessarily be a determination that the excessive speed of the taxicab was the proximate cause of the accident, and that the position of the truck, encroaching more or less upon the left or wrong side of the street, did not cause or materially contribute thereto. The real issue as here outlined was fairly submitted by other instructions.

From what has been said it reasonably follows that the trial court did not err in refusing to give appellant's requested instruction with reference to the truck being upon the wrong side of the street, because that instruction omitted the necessary element that such fact, if found, must have caused or contributed to the accident.

The third point argued relates to a supposed improper remark of counsel in addressing the jury. Aside from the fact that the remark objected to seems to have been in answer to an equally improper remark

of opposing counsel, the court immediately instructed the jury to disregard such remarks, and we cannot presume that the jury disregarded the court's instruction.

Finding no reversible error, the judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 17090. *En Banc.* March 28, 1922.]

THE STATE OF WASHINGTON, *on the Relation of C. H. Lehman, Appellant,* v. KENNETH L. PARTLOW *et al., Respondents.*[1]

HEALTH (5, 6)—REGULATION—POWER TO MAKE—CONTAGIOUS DISEASES. The state board of health has power, under Rem. Code, § 5406 [Rem. Comp. Stat., § 6001], to provide quarantine regulations fixing isolation periods for unvaccinated pupils and teachers which are binding and conclusive in the courts, unless it can be said that they are arbitrary, capricious or unreasonable.

SAME (5, 6). A valid order of the director of health as to the vaccination of school children and fixing an isolation period for unvaccinated persons is binding upon school directors in their official capacity, and authorizes them to make an order enforcing the regulations.

APPEAL (102)—RIGHT TO APPEAL—CESSATION OF CONTROVERSY. An appeal from a writ of mandate requiring the admission of a pupil who had been excluded from school for eighteen days, becomes a moot question, when not heard until after the expiration of the period.

MITCHELL, J., dissents.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered February 8, 1922, upon sustaining a demurrer to the answer, dismissing an action for a writ of mandamus, after a hearing before the court. Affirmed.

[1]Reported in 205 Pac. 420.

Vance & Christensen, for appellant.

The Attorney General and *Roscoe R. Fullerton,* for respondents.

F. W. Loomis, amicus curiae.

TOLMAN, J.—On July 27, 1921, the state board of health, proceeding regularly, adopted and promulgated the following rule and regulation:

"If smallpox exists in a community, the county or city boards of health shall provide free vaccination for persons who have no funds to procure vaccination from other sources. When smallpox exists in a community, no child, teacher or janitor shall be permitted to attend school, or teach or labor therein, without presenting satisfactory evidence of having been successfully vaccinated within seven years from the date of the commencement of the school term: *Provided,* that should any city or county health officer, having jurisdiction over any school district in which there is a case of smallpox, be of the opinion that any pupil, teacher or janitor, as mentioned herein, should not be vaccinated because of some physical defect or some active or latent disease, then such health officer shall refer the matter to a board of three competent, licensed and practicing physicians, actually living within the jurisdiction of such health officer, such board to be appointed by the board of health having jurisdiction over such health officer; should a majority of such board of physicians, after a careful personal examination, be of the opinion that any such pupil, teacher or janitor is not in condition to submit to vaccination, and that such vaccination would prove harmful to such pupil, teacher or janitor, then such health officer shall issue a certificate to that effect and such pupil, teacher or janitor shall not thereafter be required to submit to such vaccination during the time specified by such board of physicians: *Provided,* that should action be referred to a board of physicians as provided herein, then such pupil, teacher or janitor shall be prohibited from attending, teaching or labor-

ing in or around such school until the matter is finally determined by such board of physicians."

This regulation, ever since its adoption, has been, and now is, in full force and effect.

For some time prior to and at the time this action was instituted, the disease of smallpox was prevalent in various parts of the state, and particularly in the city of Olympia, which comprises school district No. 1 of Thurston county. On or about January 16, 1922, the director of public health of the state of Washington notified the county health officer of Thurston county, and the city health officer of the city of Olympia, that, in his opinion, owing to the prevalence of smallpox in the public schools of the district referred to, all pupils in such schools were "contacts," or, in common parlance, possible carriers of the disease, and that because of the conditions, the regulation hereinbefore set out should be vigorously enforced, and that no child should be permitted to attend the public schools except upon compliance with the conditions contained in the regulation. The county health officer thereupon gave notice to respondents, as directors of school district No. 1, of the directions so received from the state director of health. Following the receipt of this notice, and on January 19, 1922, respondents, as such directors, issued to all to be affected thereby a bulletin or notice containing the following language:

"Prior to February 1st, 1922, it will be necessary for every pupil, janitor and teacher in the schools of Thurston county to present to the school authorities either a physician's certificate showing that the individual concerned has had smallpox or a similar certificate evidencing vaccination within the last seven years. Those who do not comply with the foregoing regulations are to be excluded from the schools and isolated in their homes for a period of eighteen days immediately following the date mentioned."

Hazel Lehman, appellant's minor daughter, was then a pupil in one of the schools of the district. It is not claimed that she was in fact a disease carrier, that she then had smallpox, or was other than a normal, healthy child. She failed, however, to comply with the regulation of the state board of health, or with the notice from the school board, and was accordingly excluded from the school in which she was enrolled, on February 1, 1922. Thereupon appellant, as relator, filed his affidavit in the superior court for Thurston county, seeking a writ of mandate requiring the school directors to readmit the pupil named to the public schools. An alternative writ was issued, to which respondents made return. A demurrer was interposed to the return, and upon a hearing thereon, the demurrer was overruled. Appellant electing to stand upon his demurrer, a judgment followed quashing the alternative writ and dismissing the action, from which appellant prosecutes this appeal.

It will thus be seen that the facts are not in dispute. The question presented is one of law only, namely, has the state board of health power to promulgate and enforce the regulation mentioned?

Section 1, Art. XX, of the constitution provides:

"There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct."

Pursuant to this mandate, §§ 5404 to 5415, inclusive, of Rem. Code were enacted. Section 5404 (P. C. § 5277), creating the board, has been superseded by § 56, ch. 7, p. 34, of the Laws of 1921. [Rem. Comp. Stat., § 10814.] The later act, while it changes the personnel of the board in part, does not in any degree affect or change its powers and duties. These powers

and duties are defined in § 5406 (P. C. § 5278), which reads:

"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people of the state. The board shall have supreme authority in matters of quarantine, and may declare and enforce it when none exists, may modify, relax or abolish it when it has been established. The board may have special or standing orders or regulations for the prevention of the spread of contagious or infectious diseases, and for governing the receipt and conveyance of remains of deceased persons, and such other sanitary matters as admit of and may best be controlled by universal rule. It may also make and enforce orders in local matters, when in the opinion of the state board of health, an emergency exists and the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when no such local board has been established, and all expenses so incurred shall be paid by the county in which such services are rendered out of the general fund of said county. It shall be the duty of all local boards of health, health authorities and officials, officers of the state institutions, police officers, sheriffs, constables, and all other officers and employees of the state, or any county, city or township thereof, to enforce such quarantine and sanitary rules and regulations as may be adopted by the state board of health, and in the event of failure or refusal on the part of any member of said boards or other officials, or persons in this section mentioned to so act, he or they shall be subject to a fine of not less than fifty dollars, upon first conviction, and upon conviction of second offense of not less than one hundred dollars. The board shall make careful inquiry as to the cause of disease especially when contagious, infectious, epidemic or endemic, and take prompt action to control and suppress it. It shall respond promptly, when called upon by the state or local government and municipal or township boards of health, to investigate and report upon the water supply, sewerage, disposal of excreta, heating, plumb-

ing, or ventilation of any place or public building." [Rem. Comp. Stat., § 6001.]

Section 5408 (P. C. § 5293), provides for a commissioner of health to be selected by the state board of health, and § 5410 (P. C. § 5294), in defining the duties of the commissioner of health, among other things, provides:

"It shall be his duty to strictly enforce all laws passed for the protection of the public health and improvement of sanitary conditions of the state and to enforce all rules, regulations and orders of the state board of health. He shall investigate all epidemics of disease that may occur in the state and advise the local health officers as to the best measures to be taken to prevent and control such disease and he shall supervise all measures taken by local health officers for the suppression and control of disease." [Rem. Comp. Stat., § 6004.]

Chapter 7, p. 12, Laws of 1921, § 2 [Rem. Comp. Stat., § 10761], provides for a director of health in lieu of a commissioner of health, and in § 59, p. 35, of that act it is provided:

"The director of health shall have the power, and it shall be his duty:

"(1) To exercise all the powers and perform all the duties now vested in, and required to be performed by, the state commissioner of health;" [Rem. Comp. Stat., § 10817.]

So then, we have here a rule or regulation adopted by the state board of health under the authority given it by § 5406, *supra,* and enforced by the director of health under the express terms of § 5410, *supra,* and since in *State ex rel. McBride v. Superior Court,* 103 Wash. 409, 174 Pac. 973, after a full investigation and consideration, this court in an exhaustive opinion upheld the statute, declared the acts and rulings of the

board of health to be final and conclusive, and not to be reviewed by the courts or denied because the authority may be abused or the law maladministered, and that the finding of fact by a properly constituted health officer was final and binding upon the public as well as upon the courts, there seems to be nothing further which need be said, especially as there is no allegation or contention that the action complained of in this case was in anywise arbitrary, capricious or unreasonable.

Some contention is made that, because in § 5406, *supra,* school directors are not specifically named as among the officers whose duty it is to enforce the rules and regulations of the state board of health, the notice given by respondents should be held to be ineffectual for any purpose. But it follows from what has already been said that the order of the director of health, being valid, was binding upon all affected thereby, and the respondents, as school directors, had no more right to disregard or disobey that order in their official capacity than they would have as individuals.

A further argument is based upon the latter part of respondents' notice, which provides:

"Those who do not comply with the foregoing regulations are to be excluded from the schools and isolated in their homes for a period of eighteen days immediately following the date mentioned."

it being urged that the provision with reference to isolation was not embraced in the regulation of the state board of health; that the school board had no authority to add anything thereto, or to adopt rules of its own upon that subject. It is doubtful if, under the allegations of appellant's affidavit, which stands as a complaint in this case, or his prayer for relief, this question can now be presented; but, in any event, the eighteen day isolation period had fully expired before this case was reached for hearing in this court, and the

question is therefore a moot one only, which, under our well-established rule, we will not now consider or decide.

The judgment is affirmed.

PARKER, C. J., FULLERTON, BRIDGES, HOVEY, HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

MITCHELL, J. (dissenting)—This action was instituted on the relation of one in his own individual right, and it is plain to me that the whole case is now a moot one and that the appeal should be dismissed for that reason.

[No. 16683. Department One. March 28, 1922.]

W. S. BARNETT, *Respondent*, v. JOSEPH MAYER & BROTHERS *et al.*, *Appellants*.[1]

CORPORATIONS (82)—STOCKHOLDERS' MEETINGS — WHAT CONSTITUTES. A conference between members of a family holding all the stock in a corporation, for the purpose of determining business policies, will not be held to be a stockholders' meeting, where it was not so intended and no corporate record was made of what transpired.

SAME (121)—AGENTS—REMOVAL. An employee of a corporation is not discharged by a vote of the stockholders, authorizing a certain officer to discharge him, where such officer refused to do so, for reasons apparently justifying such course; nor would he be discharged by notice from another officer not authorized by affirmative action of the corporation so to do, no such affirmative action being possible because the hostile factions held an equal interest and control in the company.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 7, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

[1]Reported in 205 Pac. 396.

Frank A. Noble, for appellants.
Riddell & Brackett, for respondent.

TOLMAN, J.—Respondent, as plaintiff, brought this action to recover an amount alleged to be due him as commissions earned upon an agreed basis while employed as a traveling salesman for the appellant Joseph Mayer & Brothers, a corporation. Appellant, Mayer Brothers, a corporation, was made a party defendant upon the theory that it was the successor in part to the business of Joseph Mayer & Brothers, and had, in writing, agreed to pay the valid and legal obligations of that corporation as they existed on January 1, 1920. The case was tried to the court without a jury, and from a judgment in favor of respondent and against both corporations in the sum of $894.34, with interest and costs, both appellants appeal.

There is but little dispute as to the amount of the recovery, it being the main contention that respondent had been duly discharged by the old corporation prior to the rendering of the services mentioned, and that therefore he is entitled to recover nothing.

It appears that respondent had been for many years in the employ of Joseph Mayer & Brothers, and in 1917 he was, by agreement, put upon a commission basis and authorized to continue to represent his house in the territory he had previously covered, which was California and adjacent states. Joseph Mayer & Brothers was what may be called a family corporation, all of its capital stock being held and owned by three brothers, Joseph, Albert and Markus Mayer. Its business had been managed and controlled for many years by two trustees, Joseph Mayer and Albert Mayer, the former being president, and the latter the secretary-treasurer of the corporation. For some years prior to the time in question, these two brothers had serious-

ly disagreed regarding the conduct of the business, and there was great lack of harmony between them. The capital stock being divided equally between the two factions, neither could oust the other, and they each continued in office at cross-purposes with the other. Respondent had originally been employed by Joseph Mayer; had always worked solely under his direction, and the commission contract under which he was working had been made with Joseph Mayer, representing the corporation.

In January, 1919, a conference was held upon a Sunday morning at the office of the corporation. All of its stockholders were present, as was also Siegfried Mayer, a son of Joseph Mayer, who was not a stockholder. The meeting appears to have been in the nature of a family conference with reference to the affairs of the corporation, and not a meeting of the stockholders or trustees as such, and no record was made or entered in the books of the corporation as to what was there agreed upon. According to the testimony, at this meeting it was informally agreed between all present that a place should be provided for Siegfried Mayer by giving him the position and territory then occupied by respondent, and additional territory in Alaska which had previously been covered by Markus Mayer, and that Joseph Mayer would at once notify respondent that his employment would cease on July 1, 1919. No such notice of dismissal was ever given, Joseph Mayer claiming that, by reason of the later discovery by him that Albert Mayer, who was in charge of the sales department, was withholding orders from the factory department, which was in his own charge, to the detriment of the corporation and its business, and for his own personal advantage, he was justified in withdrawing his consent to the discharge of respondent and in

declining to carry out the arrangement theretofore agreed upon. Respondent had no notice or knowledge whatever of this meeting or of any intention that he should be discharged until some time in October, when he was so informed by Albert Mayer, as we shall later mention.

Acting upon his belief that the sales department was withholding orders from the factory department, Joseph Mayer, by telegram to respondent in August, 1919, directed him to send all orders to Joseph Mayer personally, so that there should be no opportunity for the sales department to interfere, and later in the same month, by letter, directed respondent to come to the home office to assist in the management of the factory department temporarily, as he, Joseph Mayer, contemplated undergoing an operation which would necessitate his absence from the business for a time. Respondent complied with this request and it was arranged between Joseph Mayer and himself that he should remain at the factory until January 1, 1920, at a salary of $75 per week, and that Siegfried Mayer should cover his territory during that time. Just how soon after respondent took up his duties at the factory Albert Mayer learned of the fact, does not clearly appear; but on October 4 he notified Joseph Mayer that he would issue and sign no more salary checks for respondent, and Joseph Mayer immediately replied in effect that respondent would remain on the pay roll until he, Joseph Mayer, saw fit to discharge him. Thereafter, about October 11, Albert Mayer attempted to orally discharge respondent, and on October 16, by letter, sent to respondent checks said to be in full for services to date, in which letter this language appears:

"This is to notify you that your services were terminated under date of October 11, and this company will

not be responsible for any further services which you may attempt to render."

Respondent informed Joseph Mayer of the attitude which Albert Mayer had assumed towards him, and was told that there was no agreement for his discharge, to pay no attention to what Albert Mayer had or might say or do, and to proceed with his duties as theretofore. Accordingly, respondent continued in his employment until November 1, and then, with the consent and under the direction of Joseph Mayer, he returned to his former duties in California, and thereafter and before January 1, 1920, obtained and sent to Joseph Mayer, in accordance with the telegraphic instructions given him in August, the orders upon which the present claim for commissions is based.

About February 4, 1920, an agreement was reached between the members of the Mayer family by which a division was made of the business of Joseph Mayer & Brothers, the factory department going to Joseph Mayer and being incorporated in the name of Joseph Mayer, Incorporated, and the sales department going to the other brothers and being incorporated in the name of Mayer Brothers. The latter corporation duly assumed and agreed to pay all of the valid and legal indebtedness of Joseph Mayer & Brothers as it existed on January 1, 1920, and hence it is liable for respondent's claim, if anything was legally owing by the original corporation to respondent on the date specified.

Appellant strenuously attacks the facts as found by the trial court, of which the foregoing is a reasonably fair resume, contending that respondent's return to California and subsequent solicitation of orders was not in good faith because he then knew he had been discharged by the action of the trustees of Joseph Mayer & Brothers, in January, 1919; that such action

was the act of the corporation, duly adopted at a corporation meeting; that Joseph Mayer was not justified in failing to give respondent notice thereof and discharging him accordingly; and that, because of such failure, Albert Mayer had a right to and did discharge respondent in October before the rendition of those services. So far as these matters are questions of fact, we are, after a study of the record, abundantly satisfied with the findings of the trial court, which are sustained by a fair preponderance of the evidence.

Appellant contends that the meeting in January at which the discharge of respondent was agreed upon must, even under the facts found, as a matter of law, be held to be a corporate meeting. To this we cannot assent. If it was intended to be a corporate meeting by those who participated, all interested being in fact present, then it might be such, notwithstanding lack of notice, informality and failure to make a written record; but if those who participated did not so intend, then it would be no more than a conference of individuals not binding upon the corporation. Albert Mayer, clearly and without qualification on cross-examination, testified that the meeting was not a stockholders' meeting, but only an informal family conference for the purpose of determining business policies. From this testimony and all the surrounding circumstances, the trial court rightly determined that the meeting was a family conference only.

But if the contrary were true, we could not say that the evidence preponderates against the findings of the trial court that Joseph Mayer had a right (presumably because of the subsequent acts of Albert Mayer) to refuse to discharge respondent or permit others to do so, and to continue respondent in the employ of the corporation. In any event, the January agreement, as testified to, did not purport to discharge respondent

at that or at any future time, but was only to the effect that Joseph Mayer should discharge him, and Albert Mayer was given no authority in the premises. Joseph Mayer having done nothing, some further affirmative act on the part of the corporation was necessary to effectuate respondent's discharge. No such affirmative action is shown to have been taken, nor could it be so long as the hostile factions each held an equal interest and had equal control and neither would give way to the will of the other.

Finding no error, the judgment appealed from is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 17063. Department One. March 28, 1922.]

L. KRACKE, *Respondent*, v. MICHAEL COHEN *et al.*, *Appellants*.[1]

APPEAL (356)—RECORD—DISMISSAL—TIME AND MODE. A motion to dismiss an appeal and affirm the judgment on a short record prepared by respondent will not be granted because the appeal was taken without exceptions taken to the findings of fact and before settlement of a statement of facts or bill of exceptions; since it cannot be known in advance what error the appellant will assign; nor can the supreme court review the merits on such a motion to dismiss.

Motion to dismiss an appeal from a judgment of the superior court for King county, Griffiths, J., entered October 17, 1921. Denied.

John F. Dore, for appellants.

James R. Chambers, for respondent.

BRIDGES, J.—The respondent has moved to dismiss this appeal, for affirmance of the judgment, and for

[1]Reported in 205 Pac. 13.

judgment against the sureties on the appeal and supersedeas bonds. The grounds of the motion are that the appellant has taken no exceptions to the findings of fact or conclusions of law in a law case tried by the court without a jury, and that no bill of exceptions or statement of facts has been filed with the lower court within ninety days from the date of the entry of the judgment. The respondent has brought here a short record which shows, among other things, that, on October 17, 1921, the court, after having made its findings and conclusions, entered a judgment in favor of the respondent, and that, on January 4, 1922, appellants served and filed their notice of appeal, and on January 7, filed their appeal and supersedeas bond.

The motion must be denied. In the first place, the clerk's certificate to the transcript is that it contains such portions of the records and files as he has been directed by the respondent to transmit to this court. For all that appears, it may be that the appellant has moved against or demurred to the complaint or other pleadings of the respondent. If so, we would be required to review the actions of the trial court on them, even though there are no exceptions to the findings and conclusions and no statement of facts. Again, it may be that the appellant will contend that the judgment is not supported by the findings. We can review that question without either a statement of facts or exceptions to the findings of the court. But such a review would require us to examine into the merits of the case, a thing we will never do on a motion to dismiss. Some expressions may be found in our cases which at first glance may seem to indicate that we will examine into certain merits to determine whether a motion to dismiss will be granted. But we believe that all such expressions will be found in cases where the motion and the merits have been presented together. *Hatch v.*

Hover-Schiffner Co., 101 Wash. 551, 172 Pac. 817, is a case of this kind.

The motion is denied.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16482. Department Two. March 28, 1922.]

LAKE UNION REALTY COMPANY, *Respondent*, v. N. H. WOOLFIELD *et al.*, *Appellants*.[1]

LANDLORD AND TENANT (4)—EXISTENCE OF RELATION—EVIDENCE. The business manager of a tenant on leased premises, who, after termination of the lease, assumed possession without color of right or recognition, is not a tenant; and the conventional relation does not exist from the fact of his having previously given checks for the rent on behalf of the lessee for whom he was working.

FORCIBLE ENTRY AND DETAINER (1)—LANDLORD AND TENANT (126)—ACTIONS—EXISTENCE OF RELATION—STATUTES. Under Rem. Code, § 812, unlawful detainer may be maintained against one who enters without permission or color of right, although the conventional relation of landlord and tenant does not exist.

FORCIBLE ENTRY AND DETAINER (2)—NOTICE TO QUIT—SUFFICIENCY. Under subdiv. 3, Rem. Code, § 812, a notice in unlawful detainer against one entering without permission or color of right, properly requires, in the alternative, a surrender of the premises or the payment of rent.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 13, 1920, upon findings in favor of the plaintiff, in an action of unlawful detainer, tried to the court. Affirmed.

Philip Tworoger, for appellants.

Lundin & Barto, for respondent.

MAIN, J.—This was an action for unlawful detainer. The trial resulted in findings of fact, conclusions of law sustaining the right to maintain the action, and

[1]Reported in 205 Pac. 14.

judgment was entered in the sum of $1,800. From this judgment, the defendant J. B. Newton appeals. The facts as found by the trial court and which are supported by the testimony are, in substance, as follows:

The respondent, Lake Union Realty Company, a corporation, was the owner of a building located at the northwest corner of Second avenue south and Washington streets, in the city of Seattle. On May 28, 1918, respondent leased to one N. H. Woolfield one of the storerooms in the building. This lease was for a period of two years, which was to commence on the first day of January, 1919, and end on the first day of January, 1921. Prior to the first day of July, 1920, the tenancy under the lease was terminated by agreement between the respondent and Woolfield. The lease provided for a rental of $200 per month. Prior to the first day of July, 1920, the appellant, J. B. Newton, had managed for Woolfield the business conducted on the premises. Newton claimed to have been a partner with Woolfield in the enterprise, and prior to the first of July, 1920, to have purchased the business. The trial court found on this matter that the appellant had no right, title or interest in the lease, and that, on July 1, 1920, without permission of the respondent, and without having any color of title thereto, he entered the premises. On the second day of July, 1920, the appellant was served with a notice in writing requiring in the alternative the payment of rent or surrender of detained premises.

The first question to be determined is, what was the relation of the appellant to the respondent on the first day of July, 1920. The lease which had been made to Woolfield had been terminated by agreement. The appellant was not a party to the lease and had no interest therein. He had conducted the business as a manager

for Woolfield. When the lease expired on July 1 under the agreement, the appellant continued in possession, not as manager of Woolfield, but asserting a right individual to himself. The lease between the respondent and Woolfield contained a provision against subletting without consent and the appellant had no rights under this lease. During the time that he was manager for Woolfield, he paid the rent with checks signed by himself, apparently out of the proceeds of the business. The receipts, however, which were given for the rent all specified that it was received from Woolfield. Under the facts, there was no recognition by the respondent of the appellant as tenant under the lease. The appellant, in assuming possession on July 1, 1920, did so without permission of the respondent and without having any color of title thereto. If the tenancy existed, it was one that arose by implication from the fact that the respondent served the notice demanding the payment of rent in the sum of $450, or that the premises be vacated. Conceding that the tenancy thus arose by implication, the respondent would have the right to maintain the action, since the rent demand was not paid. On the other hand, if no tenancy arose, the respondent had a right to maintain the action under subd. 6 of § 812, Rem. Code (P. C. § 7970). This question is settled in *Williamson v. Hallet,* 108 Wash. 176, 182 Pac. 940, where it is said:

"So here, as found by the trial court and established by the testimony, as we read it, although appellant entered without the knowledge or express permission of respondents, yet they immediately gave their permission by demanding the rent; and the notice to quit or pay rent in itself shows permission on their part. While we are convinced that, from the facts shown, the law will imply a tenancy and an agreement to pay rent, yet if there was no permission, the legislature has put

the question at rest in this state by statute, Rem. Code, § 8805, which reads:

" 'Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand.' " [Rem. Comp. Stat., § 10621.]

The appellant argues that, before the action can be maintained, it is necessary that the conventional relation of landlord and tenant shall exist between the parties, and cites the case of *Meyer v. Beyer*, 43 Wash. 368, 86 Pac. 661. That case, however, was begun before the passage of subd. 6 of § 812, Rem. Code (P. C. § 7970). In the later case of *Columbia & Puget Sound R. Co. v. Moss*, 44 Wash. 589, 87 Pac. 951, and *Pacific Mutual Life Ins. Co. of California v. Munson*, 115 Wash. 119, 196 Pac. 633, it is pointed out that, under subd. 6, one who enters upon the land of another without permission and without color of title is within purview of the statute, notwithstanding the conventional relation of landlord and tenant did not exist. The appellant objects to the notice which was given which required the payment of the rent within three days, or in the alternative, the surrender of the premises. Subdivision 3 of § 812 specifies the kind of a notice to be given as one in writing requiring in the alternative the payment of rent or the surrender of the detained premises. The notice was the one contemplated by the statute and was in no manner defective. The appellant complains of the manner in which Woolfield, with the co-operation of the respondent, attempted to sever his

connection with the business and the premises prior to July 1, 1920. Whatever may be said as to the advisability of the practice which Woolfield adopted for this purpose, the matter has no material bearing upon the case as presented here. The question here is between the appellant and owner of the property. The appellant claims a right to hold under lease which had not been assigned to him and under which he had acquired no right by reason of the acquiescence of the respondent.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16580. *En Banc.* March 28, 1922.]

G. E. PETERSON *et al., Appellants,* v. J. C. C. MORRIS *et al., Respondents.*[1]

PARTNERSHIP (55) — ACTIONS — CAPACITY TO SUE — CONDITIONS PRECEDENT—STATUTES. Rem. Code, §§ 8369-8373, requiring the filing of a partnership statement, as a condition precedent to maintaining an action, relates only to the capacity to sue, and may be complied with by the filing of a statement after the partnership had ceased to do business as a going concern.

JUDGMENT (183)—RES JUDICATA—FINALITY—REVERSAL ON APPEAL. On the reversal of a judgment, rendered below on the merits, it ceases to be *res judicata* thereon.

SAME (188, 189)—RES JUDICATA—MERITS OF CONTROVERSY. The dismissal of a cause of action brought by a partnership, for the reason that the plaintiffs then had no capacity to sue, by reason of failing to file the precedent statutory partnership statement, is not *res judicata* on the merits or a bar to a subsequent suit in which they had capacity to sue.

PLEADING (87)—DEMURRER—PLEADING GOOD IN PART. Upon overruling plaintiff's demurrer to a defense based on the ground that it did not state sufficient facts, it is error to dismiss the action, where the answer was not a complete, but only a partial, defense.

[1]Reported in 205 Pac. 408.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 30, 1920, upon overruling demurrers to the answer, dismissing an action on contract. Reversed.

Bates & Peterson and *E. N. Eisenhower*, for appellants.

Weter & Roberts (*Wm. G. Long*, of counsel), for respondents.

PARKER, C. J.—The plaintiffs, Peterson and Malim, commenced this action in the superior court for King county, seeking recovery of a money judgment against the defendants, Morris and wife, in the sum of $772. Their claim for recovery, set forth in two causes of action, grew out of a contract entered into by them in their firm name of "Moon Motor Sales Company" with the defendant Morris on September 28, 1915, in which contract they agreed to purchase a certain number of Moon automobiles from Morris and he agreed to give them the exclusive right of sale and distribution of Moon automobiles within Pierce county, in this state. This is an appeal from a judgment of the superior court rendered upon the overruling of the plaintiffs' demurrers to the defendants' second and third affirmative defenses and the election of the plaintiffs to not plead further.

The plaintiffs allege in their complaint that, at all times in question, they were doing business under the firm name and style of Moon Motor Sales Company, and have duly filed their certificate of partnership with the county clerk of Pierce county. The defendants' denials in their answer include a denial of the allegation of the filing of the partnership certificate by the plaintiffs, in so far as such filing was timely. The denials of the answer were followed by three affirma-

tive defenses, the first of which we need not here notice.

In their second affirmative defense the defendants allege:

"That although all matters sued on in the complaint herein, arose, as therein alleged, in connection with the contract of September 28, 1915, and within one year thereafter, yet the plaintiffs wholly neglected and omitted to file in the county in which they were doing business under an assumed name any certificate of any sort in reference to the persons interested in said business and conducting the same, except that on February 13, 1919,—the day on which this present action was instituted,—and long after the plaintiffs had ceased to be in partnership or carry on any business in Pierce county, Washington, as Moon Motor Sales Co.,—they filed in the clerk's office of Pierce county, Washington, a certificate in the words following:"

This is followed by a copy of the partnership certificate, showing its execution and filing in the office of the county clerk of Pierce county on February 13, 1919, the day of the commencement of this action. The sufficiency of the execution and filing of this certificate is challenged only as not being timely filed.

The defendants' third affirmative defense is that of *res judicata* by a judgment rendered in a former action. In this affirmative defense there is set out the record of that case, which may be summarized as follows: These plaintiffs sought in that action, in the superior court for King county, to recover from these defendants a money judgment in the sum of $3,331, which for present purposes we may assume included the same causes of action upon which recovery is sought in this action. In that action, by appropriate allegations and denials, there was put in issue the fact as to whether or not the plaintiffs had duly filed their partnership certificate as required by law, entitling them to maintain an action in the courts. In that ac-

tion, by appropriate denials, there were also put in issue the facts alleged in the complaint touching the merits of the plaintiffs' claim for recovery. In that action the defendants also set up and plead, both as an affirmative defense and as a counterclaim, their claim against the plaintiffs in the sum of $4,000, praying that the plaintiffs take nothing and that they (defendants) recover from the plaintiffs judgment in the sum of $4,000. The allegations of that affirmative defense and cross-complaint were put in issue by appropriate denials made in the plaintiffs' reply thereto. That action came on for trial before the superior court sitting without a jury, and resulted in findings of fact, conclusions of law and judgment, awarding to the plaintiffs, doing business under the firm name of Moon Motor Sales Company, and against the defendants, recovery in the sum of $735.89.

The superior court found, as a basis for that judgment, that the plaintiffs were entitled to recover from the defendants $772, apart from the defendants' counterclaim; but that the defendants were entitled to set off the sum of $36.11 upon their counterclaim, as against the plaintiffs' larger claim. The court thereby arrived at the sum of $735.89 as the net amount the plaintiffs were entitled to recover from the defendants in that action, and rendered judgment accordingly. The defendants appealed from that judgment to this court, and their appeal was disposed of by our decision in *Peterson v. Morris,* 104 Wash. 507, 177 Pac. 320; which decision is embodied in and made a part of the defendants' third affirmative defense of *res judicata* in this case. In that decision this court held, in substance, that the plaintiffs had not the capacity to maintain that action, as plaintiffs, in the superior court, because the fact of the filing of their partnership

certificate, as required by law, was denied and put in issue therein, and no evidence was offered upon that question. In other words, this court held that the plaintiffs were not entitled to maintain that action, in the sense that they could be awarded any affirmative relief therein, because they had no capacity to sue upon the partnership claims upon which they sought recovery; but held that the finding in favor of the plaintiffs in the sum of $772, viewed merely as a defense to the defendants' cross-complaint, upon which they were awarded only $36.11, had the effect, in any event, of being a complete set-off to, and cancellation of, the $36.11 obligation of the plaintiffs to the defendants. This court so held upon the theory that, while the plaintiffs had no capacity to sue and obtain any affirmative relief, they did have capacity to make any proper defense, affirmative as well as negative, to the defendants' counterclaim looking to preventing the defendants from recovering an affirmative judgment against them; citing our decision in *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition,* 68 Wash. 457, 123 Pac. 605.

These second and third affirmative defenses so alleged in the defendants' answer in this case were demurred to by the plaintiffs upon the ground that neither constituted a defense to this action, which demurrers were by the superior court overruled; the court holding in effect that each of them stated a complete defense to the plaintiffs' causes of action as alleged in the complaint. Thereupon the plaintiffs electing to not plead further and stand upon their demurrers, judgment was accordingly rendered against them dismissing the action. From this disposition of the case, the plaintiffs have appealed to this court.

We first inquire as to whether or not the facts al-

leged in the second affirmative defense show that the plaintiffs are not entitled to maintain this action because of their failure to timely file their certificate evidencing their partnership, doing business in the firm name of Moon Motor Sales Company. The sufficiency of the allegation in the plaintiffs' complaint of the filing of their partnership certificate is not challenged, and the denial thereof found in the negative portion of the defendants' answer is only a qualified denial; that is, the denial is in general terms followed by the words, "except in so far as such filing may be admitted in the second affirmative defense hereinafter set out." So the question becomes one as to whether the facts alleged in the second affirmative defense show that the plaintiffs have or have not timely filed their certificate of partnership. We say timely because the only contention here made by counsel for the defendants touching the filing of that certificate is that it was not timely filed, since it was filed, as they allege, "long after the plaintiffs had ceased to be in partnership or carry on any business in Pierce county, Washington, as Moon Motor Sales Company;" but admitting that the certificate was filed on the day of the commencement of this action. Now it has become the settled law of this state that a partnership, the name of which is such as to call for the filing of a partnership certificate under §§ 8369-8373, Rem. Code (P. C. §§ 4356-4360), may acquire the right and capacity to maintain an action the cause for which arises out of some partnership transaction or contract, by the filing of its partnership certificate in the office of the county clerk after, as well as before, the occurring of such transaction or the making of such contract, or even after the commencement of an action wherein recovery upon such transaction or contract is sought. *Sutton & Co. v. Coast Trading Co.,*

49 Wash. 694, 96 Pac. 428; *Malfa v. Crisp,* 52 Wash. 509, 100 Pac. 1012; *McGillivray v. Columbia Salmon Co.,* 104 Wash. 623, 177 Pac. 660.

But it is here argued in behalf of the defendants that the plaintiffs' partnership certificate was not timely filed so as to give them capacity or entitle them to maintain this particular action, because of the allegation in defendants' second affirmative defense that prior thereto "the plaintiffs had ceased to be in partnership or carry on any business in Pierce county, Washington, as Moon Motor Sales Company." Carried to its logical conclusion, this argument would seem to mean that, when a partnership has ceased to do business as such looking to the making of profit in the business for which it was organized, its business affairs remaining unsettled as between its members and also between it and third parties, it and its members lose the right to acquire the capacity or right to sue upon partnership claims by filing a partnership certificate under §§ 8369-8373, Rem. Code (P. C. §§ 4356-4360). This, we think, cannot be the law. Manifestly the partners have as much right to continue their partnership relations under their partnership name, pending the settlement of their partnership affairs and the prosecuting of actions to secure their rights incident thereto as against third parties during such period of settlement, as when the partnership is a going concern being conducted for the purpose of making profit for its members, and to that end may file their partnership certificate in compliance with §§ 8369-8373, Rem. Code[1] (P. C. §§ 4356-4360). Manifestly the owners of any business or the assets thereof have as much right to make the settling up of such business a partnership business and perfect a partner-

[1]NOTE: See Rem. Comp. Stat., §§ 9976-9980.

ship to that end, as they have to organize or perfect a partnership for any other lawful purpose. We think the existence of this partnership and its capacity to sue upon these causes of action, in view of the admission that a proper partnership certificate was filed at the time of the commencement of this action, no challenge being made to the sufficiency thereof, other than as to the time of its filing, affirmatively appear by the allegations of the second affirmative defense. Of course, if the defendants had, in their second affirmative defense, negatived the fact of these parties being partners, or that they were all members of the partnership, we would have a different question here. We think it has become well settled by our decisions that the failure of a partnership to file a certificate of partnership, as required by the statute, has only the effect of depriving the partnership of the capacity to sue, and does not touch the question of the existence of a cause of action which a partnership not having filed such certificate may possess. In *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837, Judge Ellis, considering the effect of the failure of a partnership to file its partnership certificate, speaking for the court, said:

"We have consistently held, in construing this statute and the cognate statute as to corporations, that they go only to the capacity of the party to sue and that the objection must be deemed waived unless raised by demurrer or answer. *Bowman v. Harrison, supra; Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655."

Our later decisions in *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123

Pac. 605, and *Crosier v. Cudihee*, 85 Wash. 237, 147 Pac. 1146, are in harmony with this view of the law. It seems to us to follow as a matter of course that these causes of action, assuming they are well founded, viewed as substantive rights apart from the capacity to sue thereon, have at all times in question been, and now remain, in existence. Otherwise our decisions holding that, by the filing of a partnership certificate, as required by the statute, the capacity to sue upon causes of action arising out of past transactions or contracts may be acquired by a partnership are meaningless. We conclude that defendants' second affirmative defense does not in law constitute any defense or bar to the plaintiffs' causes of action as alleged in their complaint, and that the demurrer to that defense should have been sustained by the superior court. It follows that the judgment of dismissal in so far as it rested upon the overruling of that demurrer, was erroneous.

We next inquire as to whether or not the defendants' third affirmative defense alleges facts showing that the causes of action here sued upon have been adjudicated as against the plaintiffs by the final judgment rendered in the former action. Now what was the final judgment rendered in the former action? Manifestly it was not the judgment rendered in the superior court. That judgment was reversed by our decision in *Peterson v. Morris*, 104 Wash. 507, 177 Pac. 320, and by that reversal the amount of the plaintiffs' large claim was left wholly undetermined, other than as it was adjudged to be reduced in the sum of $36.11. It is true the trial court made findings which purport to go into the merits of the plaintiffs' claim and awarded the plaintiffs $772 by its findings and judgment; but that award is rendered nugatory by its re-

versal in this court, and has ceased to be an adjudication upon the merits of the plaintiffs' claim sued upon in that action, except as it reduced that claim by an offset of $36.11 awarded the defendants upon their cross-complaint. A reading of our decision in that case we think renders it quite plain that the plaintiffs were denied affirmative recovery upon their large claim drawn in question in that action solely and only because the plaintiffs had no capacity to sue by reason of their failure, prior to or pending that action, to file their partnership certificate in compliance with §§ 8369-8373, Rem. Code (P. C. §§ 4356-4360). This being true, how is it possible that it can be said with any show of reason that the plaintiffs' larger claim, in so far as it may be in excess of $36.11, was in any sense adjudicated upon the merits by the final decision of that case in this court? Indeed, that case was disposed of in this court upon the theory that the plaintiffs having no capacity to sue in the sense of seeking affirmative relief, the merits of their claim could not be adjudicated therein over the defendants' objection, which was duly made, except as a mere offset against the defendants' cross-complaint. In other words, that controversy became ultimately nothing but one in which the defendants became in effect plaintiffs by virtue of their cross-complaint, and the plaintiffs became in effect defendants because of the fact that they had only the capacity to defend, and did not have the capacity to sue and obtain affirmative relief. To hold that the plaintiffs in that action had no capacity to sue and obtain affirmative relief, as the defendants therein contended, and as this court held in upholding such contention, to us seems wholly inconsistent with a holding that their large claim therein sued upon was adjudicated upon the merits, other than to the extent

of establishing a set-off against such claim in the small sum of $36.11. It is not argued—indeed there is no room for arguing—that this court, by its final decision in that case, adjudged that the plaintiffs' claims, there and here involved, were no more in the aggregate than $36.11. Had it been affirmatively so decided therein, there would be some room for arguing that such an adjudication would be *res judicata* upon that question as against the plaintiffs in this action.

Some argument is made in behalf of the defendants rested upon the fact that the former judgment, pleaded in their third affirmative defense, was rendered after the trial upon the merits and rested upon a total failure of proof upon the question of the plaintiffs' having filed their partnership certificate. The argument seems to be that, because there was upon the trial a failure of proof on that question, the merits of the plaintiffs' causes of action were finally adjudicated, as well as the question of the plaintiffs' then capacity to sue thereon. We are not able to follow this argument. It seems to us that the very fact that it was finally adjudicated in that case that the plaintiffs had then no capacity to sue—which adjudication was made at the instance of the defendants—and obtain any affirmative relief, shows conclusively that the plaintiffs' causes of action were not adjudicated in that case further than to establish the set-off of $36.11 against them. The very thing counsel for the defendants contended for, and this court finally held in that case, was that the plaintiffs could not then be heard in court looking to the obtaining of affirmative relief. The law controlling of the question of *res judicata* here for consideration we think is well stated in general terms in 15 R. C. L. 982, as follows:

"In order to bar a second action the circumstances of the first action must have been such that the plain-

tiff might have recovered for the same cause of action alleged in the second. An adjudication made on grounds purely technical, and where the merits could not come into question, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. If the former trial went off on a technical defect, or because the suit was prematurely brought, or for want of jurisdiction, or because of a temporary disability of the plaintiff to sue, or because the plaintiff has mistaken his character, or the capacity in which he brings suit, or on any ground which did not go to the merits of the action, the judgment thereon will constitute no bar to another suit."

We conclude that the defendants' third affirmative defense of *res judicata* fails to state facts constituting such a defense to the plaintiffs' causes of action, except in so far as it constitutes a defense thereto to the extent of $36.11. The superior court was, we think, technically correct in overruling the plaintiffs' demurrer to this defense, since it did state facts constituting at least a partial defense; but it not being a complete defense, if the allegations of the complaint are true, the court did err in dismissing the action as a result of overruling that demurrer, for only a complete defense would warrant such a judgment.

The judgment is reversed, and the cause remanded to the superior court for further proceeding consistent with the law as herein expressed.

The defendant Mrs. Morris having died since the commencement of this action, the administrator of her estate has been substituted in her place. We have for convenience of expression ignored this change of parties in our discussion of the case.

FULLERTON, BRIDGES, TOLMAN, and HOVEY, JJ., concur.

HOLCOMB, J., concurs in the result.

[No. 16918. Department One. March 29, 1922.]

SYLVIA M. ROMANO, *Respondent*, v. W. S. DULMAGE MOTOR COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS (379)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS—NEGLIGENCE. Defendant's negligence in an automobile collision at a street intersection is established by his testimony showing that plaintiff's car had the right of way as the car on the right simultaneously reaching the intersection, and that the collision occurred without either driver slackening his speed or changing his course.

Appeal from a judgment of the superior court for King county, Wright, J., entered August 2, 1921, upon findings in favor of the plaintiff, in an action for damages sustained in an automobile collision, tried to the court. Affirmed.

Roberts & Skeel, N. A. Pearson, and *Ray Dumett*, for appellant.

Clem J. Whittemore, for respondent.

MITCHELL, J.—The automobile collision out of which this action arose occurred at the intersection of John street and Tenth avenue, in Seattle. The streets cross at right angles, John street running east and west. The plaintiff, driving her car, traveled west on John street, while the defendant's car, driven by an employee, traveled north on Tenth avenue. Each drove near the curb on the right-hand side of the street traveled. In their pleadings each charged that the accident was due to the negligence of the other. The case was tried without a jury, and the defendant has appealed from findings and judgment in the sum of $550.

[1]Reported in 205 Pac. 8.

It was found by the trial court that the driver of appellant's car was negligent in several respects and that his negligence was the cause of the accident. The findings are supported by a preponderance of the evidence. Respondent's testimony, in which she was corroborated, was that she was traveling ten to twelve miles an hour, and further, as follows: "Q. Compared to your speed, he was going much faster? A. Yes, sir, he was going very much faster than I was." The evidence shows that the collision occurred in a thickly settled portion of the city. John street is twenty-four feet wide between the curbs, with parking strips and sidewalk on each side twenty-one feet wide. On approaching the intersection, the respondent looked south by a building on the southeast corner of the intersection, and seeing no car coming from that direction, she then looked north, and in a moment of time the cars collided, that of the appellant being driven at a high rate of speed.

Appellant's driver, voluble if not reckless in his testimony, testified that, upon approaching the intersection of the streets, when he was at a point about ten feet south of John street, he noticed respondent's car approaching from the east on his right. He first said that at that time her car was from eighty to one hundred feet from the intersection, at another time he said it was from forty to fifty feet from the intersection, and at still another time he admitted she was about thirty to thirty-five feet east of the intersection. He testified, and it is not controverted, that he drove near the curb on the right-hand side of Tenth avenue, and that after he saw the approaching car, traveling so as to cross his way, he neither slackened his speed nor changed his course. The fact that he traveled faster, or even if he traveled only as fast as the other car,

which was running on the north side of John street, and the further fact that the cars collided before changing their courses, deprives him of the slightest opportunity to successfully deny that the two cars were simultaneously approaching the crossing.

Section 46 (Ordinance No. 39,720) of the traffic code of the city of Seattle provides, "Drivers when approaching street intersections shall look out for and give right of way to vehicles on their right, simultaneously approaching a given point, provided, however, that street cars shall have the right of way at all times at such intersections." Had the law been obeyed the collision would not have happened. No conclusion can be reached upon the record in this case other than that the violation of the ordinance by the driver of appellant's car was the cause of the accident.

Affirmed.

PARKER, C. J., TOLMAN, BRIDGES, and FULLERTON, JJ., concur.

[No. 16981. Department Two. March 30, 1922.]

CHRIS RUSTAN, *Respondent*, v. SOUTHERN ALASKA CANNING COMPANY, *Appellant*.[1]

MASTER AND SERVANT (111)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DUTY TO DISCOVER DEFECTS. A ship carpenter engaged in enlarging a hole in a roof is not guilty of contributory negligence, as a matter of law, in choosing the more direct way to his work and in stepping into a tank of hot water, where the top of the tank, which had been covered with boards, was one of the steps up, a board had been removed, the light was poor, and the tank was filled with hot water for the first time, all without his knowledge, where it appears that the other route to the roof was still more dangerous.

SAME (98)—ASSUMPTION OF RISKS—KNOWLEDGE—MAKING PLACE SAFE. In such a case, the rule that a servant assumes the risk of working in a place which he was engaged in making safe has no application, since his work had nothing to do with making the place safe.

MASTER AND SERVANT (104-1)—NEGLIGENCE (26)—STATUTORY PROVISIONS—COMPARATIVE NEGLIGENCE—RELATIVE DEGREES—DAMAGES. In an action by a servant for personal injuries based on the comparative negligence statute of Alaska, it is error to instruct that, if the negligence of the plaintiff was gross and the proximate cause of the accident, he could not recover; and to refuse defendant's request to instruct that, if both parties were negligent and the plaintiff's negligence slight and defendant's gross, then the actual damages should be reduced in proportion to the amount of negligence chargeable to the plaintiff.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 31, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Wright, Kelleher, Allen & Hilen, for appellant.

H. D. Moore, for respondent.

HOLCOMB, J.—Respondent was employed by appellant as a carpenter, and was directed to enlarge the

[1]Reported in 205 Pac. 369.

opening around the smokestack of its cannery at Rose Inlet, Alaska. There were two ways of access to the place where the hole was to be cut in the roof, where respondent did the work; one being by a stairway at some distance from the smokestack, as respondent stated, at least 100 feet from it, probably more, up to an attic, which was partly floored for about two-thirds of the distance back to the smokestack, but was filled with empty boxes and lumber, and from where the floor ceased, over a couple of loose planks laid side by side on the cross-beams of the structure, and under the slope of the roof, in semi-darkness, to the smokestack. The other way was by means of a post running from the floor to the roof, about 8 by 8, or 10 by 10 inches in dimension, which had cleats nailed across it, thus forming a ladder which led almost directly to the place of the work; at the foot of which post, and against it, was a box or tank apparently made of old planks, appearing to be gray or weather beaten; a new fish box or packing box was placed against it and used for the first step, it being about two and a half feet high; the second step being the top of the tank; and then up the cross-pieces nailed to the post to the cross-beams, a distance of about twelve feet from the floor. Respondent was given a helper, but was not directed which way to use in going to the place of work; but he and the helper, for about four days in which they were preparing to cut the hole in the roof by building scaffolding and erecting braces for the roof, used the post and cross-pieces as a stairway in going up and down. The large box or fish tank had a cover of loose boards, consisting of about three boards twelve inches wide laid on the top. The cannery had not started operation, but was being made ready to operate.

On the day in question, neither respondent nor his

helper knew of the box or tank containing hot water nor what the box was used for. There was no evidence that it had ever before held hot water, and there was no indication of it, so far as they could see, on that afternoon. The accident occurred about 5 o'clock in the afternoon, the day being cloudy and misty, and respondent had been working on the outside of the roof. Having occasion to go inside, he went down on the outside and came into the cannery building through the door. When intending to return to the roof, he went up by means of the cross-pieces and post near the place where he was to cut the hole in the roof, and stepped in the same way upon the small box, and thence to the top of the large box or tank, but a plank had been removed and his foot and leg went into the hot water which had been put into the tank, severely scalding him.

He and his helper testified that it was difficult to see on the inside of the cannery, especially after having come from the outside, but when using the boxes as steps to the post they could always see the small box or packing case, because it was new and bright-looking. The fisherman, who was employed as a fireman, was engaged in making some repairs or alterations to the hot water tank or box, and had removed the plank, which had been there before this last trip of respondent, and was standing by the tank with his back to respondent, and gave respondent no warning that he had removed the plank. Respondent was so severely scalded that the skin came off his ankle in large strips. He was taken that night to a place at some distance where there was a doctor, and received medical attention early the next morning. He suffered a great deal of pain, but in five or six weeks was able to go back and do light work. About a year later his

ankle became worse, through an ailment called a "keloid" growing upon the injured ankle where the scald had been, cutting off the circulation in his foot, causing him great pain, and making it impossible for him to stand upon that foot and ankle any great length of time. Medical expert witnesses testified that the condition was a permanent injury which would not yield to surgery. Respondent testified that on account of the injury he was no longer able to follow his trade of ship carpenter.

Respondent predicated his action upon the Alaska statute, being compelled so to do in view of our workmen's compensation act. The Alaska statute reads as follows:

"Section 2. That in all actions hereafter brought against a master or employer such as is mentioned in the first section hereof, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." Alaska Laws of 1913, ch. 45, p. 84, § 2.

Appellant conformed to the requirements of the Alaska statute by affirmatively alleging respondent's own negligence.

Appellant earnestly insists that its motion for nonsuit, for an instructed verdict, or for judgment n. o. v. should have been granted, but also urges in the alternative that its motion for a new trial should be granted.

Appellant insists that a reading of the record discloses an absolute total failure to prove any negligence

of appellant or its agents or employees, except respondent himself.

It is urged that the cannery was just being put into shape; that appellant had two means of access to the roof, where he had been directed to work; that he voluntarily chose the one over the fish box or steam tank and up the post and was not directed to do so, and that he was therefore guilty of gross negligence which was the proximate cause of the injury, and that he also assumed the risk. Cases are cited to the effect that,

"The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight."

We are unable to agree with the appellant as to these contentions. From the condition in which the route to the roof by means of the stairway was shown to be, and the lack of any adequate and safe passageway from where the floor ceased to the place where the work was to be done, it would undoubtedly have been more negligent to go that way. As to the method of going to the place of work by means of the boxes and cleats nailed upon the post up to the cross-pieces almost directly to the place of work, that would undoubtedly appear to be ordinarily safe. The large box which respondent had stepped upon for three or four days had been safe during all that time and had a cover over it, even though it did consist of loose planks, and the tank had had no steam or hot water in it. On this occasion, coming in from the brighter outside light into the more obscure interior of the building, there being no steam apparently escaping from the tank or box, and the respondent not having been warned that the plank had been removed from the top thereof, it cannot be doubted that the triers of the facts were justi-

fied in holding that respondent was not negligent at that time in following the route he did and had theretofore followed.

In *Johnson v. Tacoma Mill Co.*, 22 Wash. 88, 60 Pac. 53, a carpenter was employed to change a pipe on the mill where he had not been at work before, although he had worked for some time in and about the mill. After erecting the pipe, he stepped back to see if the same was perpendicular, and stepped into a barrel of hot water, which was located a few feet from the sidewalk and opposite the place where the pipe was erected. The barrel was sunk into the ground, its top being on a level with the surface of the ground. It was used to receive water and steam coming from the exhaust or drain pipe of some engine, the drain pipe connecting the engine with the barrel. By reason of stepping into this barrel he was scalded and injured. The mill was not running at the time, and no steam was observable in the sunken barrel. It was there held that the injured party had a right of action against the mill company on the ground of its negligence in not furnishing him a safe place in which to work. The facts in this case make the proposition in that case very applicable. The place which had been ordinarily safe had been unexpectedly, and without knowledge of respondent, made unsafe by the removal of the box cover and the putting of hot water into the tank.

Appellant also contends that respondent assumed the risk of the conditions under which he was working, because the place itself was in process of being made safe. It is a general rule that where the servant himself is engaged in making a dangerous place safe, he assumes the risk of the dangerous conditions of which he has knowledge. We so held in *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D 433, L. R.

A. 1917E 198. That rule does not apply here, however, for the work of the fisherman or fireman upon the construction of a steam tank, and the work of respondent himself in enlarging the hole for the smokestack through the roof, were neither work for the purpose of rendering the place safe. They were both engaged in the work of making ready for the operation of the cannery in general. We are therefore convinced that the case, under the facts shown and the rules of law applicable, was one to be submitted to the jury.

The trial judge submitted very fair, comprehensive and elaborate instructions to the jury; fair to both parties, except in one particular. He quoted almost literally the statute of Alaska, mentioning that the same was the law of Alaska as set forth in this opinion, and followed that instruction with a paragraph as follows:

"If, on the other hand, you should find that the negligence of the plaintiff was gross and the proximate cause of the accident, then the plaintiff cannot recover at all."

The court also instructed the jury in a later instruction to the effect that, if they found for plaintiff, it would become their duty to assess the damages in such amount as would fairly and justly compensate the plaintiff for the injuries which he established upon the trial, if any, and for the pain and suffering, if any, which he has endured by reason of such injury, and for the pain and suffering, if any, which he is reasonably certain to suffer in the future, and for the loss of earning capacity, if any, established upon the trial, and in so doing to take into consideration the severity of such injuries or the impairment of any of his faculties and health by reason of such injuries; but in no case to exceed the sum prayed for in the complaint,

namely, the sum of $10,000. The jury rendered a verdict in the sum of $3,000.

Appellant complains that the instruction as given wholly leaves out of consideration the element which the Alaska statute makes mandatory, whether the negligence of the workman and the employer was gross or slight in comparison.

Respondent contends that the paragraph above quoted, following the statement of the Alaska statute, avoids the error which appellant claims. We do not so view it. The paragraph relied upon by respondent simply instructs the jury that, if the negligence of plaintiff was gross and was the proximate cause of the accident, then he could not recover at all. It was the duty of the court to give the jury the instruction as to the comparative negligence of the parties. It seems that, when the court reached the question of the measure of damages to instruct the jury upon, he overlooked the Alaska statute and the comparative negligence feature thereof upon which the right of action was based, and upon which appellant had requested an instruction, and instructed the jury to find for respondent in the full amount of damages or not at all. Appellant was deprived thereby of the right to have the jury apportion the negligence, if both parties were negligent and the negligence of respondent was not gross or the proximate cause of the injury, and so possibly reduce the damages. The instruction requested by appellant was to the effect that, if the jury found the plaintiff and defendant "were guilty of negligence which contributed toward the injury, but that the negligence of the plaintiff was slight and that that of the defendant was gross, then, in such event, you should determine what the actual damage suffered by plaintiff was, and then reduce the amount so found in pro-

portion to the amount of negligence chargeable to the plaintiff and find a verdict in favor of the plaintiff only for the balance left after making such reduction."

This instruction should have been given. Its refusal was error, for which reason the judgment is reversed and the case remanded for a new trial.

Reversed and remanded.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16799. Department One. March 30, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. JOE ARRIGONI, *Appellant*.[1]

INTOXICATING LIQUORS (30, 50)—OFFENSES—ILLEGAL POSSESSION—EVIDENCE—SUFFICIENCY. In a prosecution for the unlawful possession of whiskey, whether the presumption from ownership of the premises was sufficiently rebutted, or whether the quantity was so negligible as to be available for unlawful use, are for the jury, where the liquor was found in defendant's house in a sink near a glass, it filled an ordinary pint milk bottle to a height of about two inches, and the defendant's wife tried to keep it from the officers, though defendant denied any knowledge of it.

SAME (30, 51)—ILLEGAL POSSESSION—INSTRUCTIONS. It is proper to instruct that, if a husband knowingly permits his wife to keep intoxicating liquors in the house for an illegal purpose, he is a participator in, and guilty of, the unlawful possession.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered November 19, 1920, upon a trial and conviction of the unlawful possession of intoxicating liquor. Affirmed.

F. A. Kern, for appellant.

C. R. Hadley, for respondent.

FULLERTON, J.—The appellant was found guilty by the verdict of a jury of the offense of unlawfully hav-

[1]Reported in 205 Pac. 7.

ing intoxicating liquor in his possession. From the judgment and sentence pronounced against him on the verdict, he appeals, assigning as errors that the evidence is insufficient to justify the verdict, and that the court erred in its instructions to the jury.

The evidence disclosed that the appellant maintained a house in the city of Cle Elum, in the front part of which he conducted a small store, selling groceries, candies, fruit, bread, pastry and so-called soft drinks. The back part of the house was used as a dwelling, in which the appellant resided with his family, consisting of his father, his wife and three children. The two apartments of the house were connected by a hallway. A warrant had been issued for a search of the premises, and the officers having the warrant in execution entered the building at the door leading into the room used as a store. On entering the building, the officers found the appellant and his wife in the storeroom, and on making known their purpose, the wife started through the hallway towards the dwelling part of the house. She was stopped, and on the subsequent search of the house intoxicating liquor was found in the kitchen in a bottle which stood on the draining board of the sink, with an ordinary whiskey glass beside it. The appellant denied having any knowledge that the liquor was in the house. His wife corroborated his statement, testifying that it was some she had procured on that day from a neighbor for use as a medicine. She testified further, however, both on her direct and cross-examination, that her purpose in starting for the back part of the house on the entry of the officers was to dispose of the liquor, which she referred to as "white mule," saying that she failed of her purpose because she was stopped while on her way by the officers. No witness testified to the quantity of liquor

in the bottle in terms of the standards usually used in liquid measurement, the evidence on the question being that the bottle in which it was contained was an ordinary pint milk bottle, and that it was filled to a height of about two inches.

The appellant's counsel argues that there is nothing in the evidence to show that the appellant had control of the liquor found, and that it was not sufficient in quantity to make it available for unlawful transportation or sale; conditions, he further argues, which are made necessary to the crime of unlawful possession under the rule announced by this court in *State v. Jones*, 114 Wash. 144, 194 Pac. 585. But conceding that the cited case is susceptible to the construction put upon it, we nevertheless think that the objections raise questions of fact for the jury rather than questions of law for the court. The liquor was found in a house in which the appellant had possession and over which he had control, and the presumption naturally and legally arises that he had possession and control of the things contained therein. The presumption is of course rebuttable, and undoubtedly was rebutted if the account given of the presence of the liquor in the house is to be taken as true. But manifestly it was for the jury, not the court, to say whether or not the account was true. So, with the quantity. It was not so utterly deficient in that respect as to be negligible and it was for the jury to say whether it was sufficient to be available for unlawful use.

The instruction complained of is the following:

"I instruct you that when the husband and wife are living together as such, the possession of one spouse is the possession of the other where it affirmatively appears beyond a reasonable doubt from the evidence that said possession of one spouse was with the knowl-

edge of the other and such possession was had on premises occupied by both husband and wife."

As applied to the facts shown in the record, we find the instruction without error. The husband is the head of the family, and as such has the general right to regulate the household and to exercise the general control of the family management. He has the right to prevent his wife from using their common residence for an illegal business or purpose. If he knowingly permits her to use it for the illegal purpose of keeping intoxicating liquors therein he becomes a participator in the act and is liable to the penalties the law inflicts for unlawful possession. The rule rests, not on a presumption of coercion of the wife by the husband, but on the principle that the husband has the right to control his household and is responsible for the illegal acts which he knowingly permits to take place therein.

The rule is stated in 21 Cyc. 1354 in the following language:

"The husband is liable for his wife's criminal acts committed by his bidding, or in his presence and under his coercion. Likewise where she, in his presence and with his knowledge, commits an act not *malum in se*, he may be found guilty, as where, with the husband's knowledge or consent, the wife sells intoxicating liquors contrary to statute. If such sales are made by her in his house, even in his absence, and even contrary to his wishes, he may be held guilty, since it is his duty to control or prevent the same."

See, also, *Commonwealth v. Barry*, 115 Mass. 146; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *People v. Sybisloo*, 184 N. W. (Mich.) 410.

The judgment is affirmed.

BRIDGES, MITCHELL, and TOLMAN, JJ., concur.

[No. 16970. Department One. March 31, 1922.]

JAMES A. P. HENDERSON *et al., Respondents,* v. ALLEN O. MILLER *et al., Appellants.*[1]

VENDOR AND PURCHASER (63, 160)—RESCISSION BY PURCHASER—RECOVERY OF PRICE—FAILURE OF TITLE. An action lies to recover money paid and rescind an executory contract for the sale of land, assigned to the plaintiffs, where a house and other improvements constituting the principal part of the consideration were not wholly on the lots, as represented, and the sellers refused to make the title to the house good or return the money.

Appeal from a judgment of the superior court for King county, Mills, J., entered July 16, 1921, in favor of the plaintiffs, in an action for rescission, tried to the court. Modified.

Reynolds, Ballinger & Hutson, for appellants.

Chadwick, McMicken, Ramsey & Rupp and *Stephen F. Chadwick,* for respondents.

MITCHELL, J.—On April 21, 1919, Allen O. Miller and wife entered into a written contract with May Farrell by which they agreed to sell to her lots 10 and 11, block B, of E. F. Beck's Replat of block 72 of Burke's Second addition to the city of Seattle. A cash payment was made and the balance of the purchase price was to be paid in monthly installments. Upon full payment the vendors were to give a good and sufficient warranty deed to the purchaser. The contract contained no provision against the right of assignment. May Farrell and her husband took possession of the premises, and after making payments in the sum of $1,355 on and according to the terms of the contract, assigned their rights and interest under the contract to James A. P. Henderson and wife on October 20,

[1]Reported in 205 Pac. 1.

1920, in consideration of the sum of $1,250, $105 less than the amount the Millers had already received from the Farrells. The Hendersons then took possession of the property and thereafter made payments according to the terms of the contract in the sum of $237.50, and made improvements on the property.

In April, 1921, upon receiving notice from the owners of the property lying immediately south that the dwelling house on the property in question extended over on the abutting property, the Hendersons caused a survey to be made of their lots, and then discovered for the first time that the house and a part of its foundation or retaining wall encroached on the lot to the south, that the garage was built partly on a public street, and that other small improvements, such as shrubbery and clothesline poles which they supposed were on the property, were not on the lots. On learning that the improvements were partly upon another lot, Henderson asked Miller if he would remedy the situation by buying a small portion of the lot upon which the house and foundation rested, and he answered that he would not. Thereupon, and on April 19, 1921, Henderson and wife executed a quitclaim deed to the property running to Miller and wife and notified them in writing it was necessary for them to rescind the sale. They demanded a return of the money expended by them. The notice further provided that, in the event cancellation was not accepted, suit would be brought to compel it. The Millers refused to make the payments demanded and to accept the quitclaim deed, and thereupon this suit was brought by the Hendersons. The judgment was for the plaintiffs, from which the defendants have appealed.

It is advisable to notice other facts in the case. The property was sold to the Farrells through a real estate

agent representing the owners. He took them to the property twice, and it appears that the owners were there at the time of the second visit. The lots are of an uneven surface and situated on a steep hillside. Much of them was covered at the time with trees and brush. The lots lie east and west. At the west end a public street was somewhat opened only a short distance north from the south line of the lots. The garage was located at the west end of the lots, an appreciable portion of it extending into the street. The residence was so located that its southerly or southeasterly corner and concrete foundation on which it rested extended over on the abutting property, and from thence the house is situated at an angle northwesterly across the lot. There were shrubbery and other small improvements appearing to belong to the property that were, however, outside of the lots. The agent testified that he told Farrell a part of the garage was in the street, while Farrell testified the agent said the approach to the garage was in the street. Neither of them knew where the southwest corner of the lots was, except the agent gave it approximately, and certainly, because of the trees and brush, it could not be seen that any part of the residence was on another lot.

The improvements, of course, as well as the lots were sold to the Farrells. Afterwards the lines of the adjoining lot to the south were run by the owners. Mr. Farrell was absent at that time and his wife, who was present, testified she did not know the property was being surveyed. Testimony on behalf of the appellants shows that, upon Mr. Farrell's return, he was informed by the owner of the adjoining lot that his house was partly on the adjoining lot. He denied this at the trial and claimed he never knew it until after the survey made in April, 1921, for the respondents. The appel-

lant Allen O. Miller admitted at the trial that he had known for ten years that a portion of the residence was not on the lots.

There are but three assignments of error and they may be considered together. It is the contention of the appellants that, the Farrells having made payments on the contract after they were advised of the true line of the property, they thereby waived their right to rescind the contract, and that, since their contractual rights gave them no legal title to the property, but a mere equity, a transfer of that equity by assignment to the respondents was subject to all existing equities against the Farrells and in favor of the Millers; that is to say, respondents were not innocent purchasers and their right of rescission is no greater than that of the Farrells at the time of the assignment.

The argument might be accepted as sound if it be admitted that Farrell knew the condition, which he denies, and if respondents received only an assignment of any cause of action the Farrells may have had and that were the cause of the complaint in this action. But this suit is not to recover the $1,355 paid by the Farrells to the appellants, nor to enforce any other right of action they had. Nor is it an action in which the respondents are disputing any right, legal or equitable, prior or superior, existing in favor of a third party. Nor is it an instance in which the assignees, respondents, knew as much at the time of the assignment to them as they did at the time of the trial, as was the case in *Cooper v. Hillsboro Garden Tracts,* 78 Ore. 74, 152 Pac. 488, Ann. Cas. 1917E 840, relied on by the appellants. It is an action to recover what the respondents have paid out, and has been brought because appellants repudiated their contract in their dealings with the respondents. They disaffirmed

promptly when they ascertained that the appellants could not perform and declared they had no intention of performing. The contract contained no prohibition or limitation against assignment. It was duly assigned to the respondents, to whom the appellants thereby became directly obligated to make a good and sufficient warranty deed when they had received full payment of the purchase price. After they became so obligated to the respondents, they received payment from them according to the terms of the contract. The obligation with the respondents was that they, the appellants, would convey a good title to the improvements as well as to the land. It was this they had represented they were selling and the possession of which was delivered and passed by the assignment into the possession of the respondents. While the testimony is not specific in that respect, it is apparent that the improvements, especially the house, constituted the principal part of the total value of the property. The respondents were occupying the dwelling at the very time the appellants received payments from them.

We need not speak of or discuss the rule as to executed contracts of sale of real estate, but only those which are executory. "It is very generally held that executory contracts for the sale and purchase of real estate may be rescinded by a suit in equity, either on account of fraud or misrepresentation entering into the execution of the contract, or where it becomes apparent that the vendor is and will continue to be unable, or has failed, to comply with his contract." *French v. C. D. & E. Investment Co.*, 114 Wash. 416, 195 Pac. 521; 27 R. C. L. § 377, p. 623.

But this case is more than that, if possible, in favor of the respondents, and all suggestion or thought of actual fraud on the part of the appellants may be

waived. The almost universal holding of the courts is that the fact that a vendor in a contract for the sale of land is not the owner thereof at the time of making the contract is not of itself ground for rescission on the part of the purchaser. It is a question of his conveying the title or having it conveyed to a purchaser when the time of performance comes. *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952; *Morris v. Columbia Canal Co.*, 75 Wash. 483, 135 Pac. 238. As if recognizing this rule of fair dealing and proposing to act in the same manner, the respondents, upon learning of the situation here, promptly spoke to appellants about the title to the dwelling, and were told by the appellants that they didn't intend to make the title good, and upon being brought into court they do not deny that the title is defective, nor claim that they can or will make it good.

The case is one in which appellants agreed to sell something the title to which they did not and do not have and which, prior to suit, they declared they would not get for their vendees. They have positively repudiated their solemn contract and we see no escape from the conclusion that the respondents are entitled to recover.

However, upon a consideration of all the facts in the case, we are of the opinion that the judgment should not include $12 on account of the cost of shrubbery planted beyond what was plainly the boundaries of the lot, nor the sum of $15 spent by the respondents for a survey of the property. In all other respects the judgment is affirmed. Remanded with directions to the superior court to modify the judgment as suggested. Respondents will recover their costs.

PARKER, C. J., BRIDGES, FULLERTON, and TOLMAN, JJ., concur.

[No. 16917. Department Two. April 3, 1922.]

A. DALK *et al., as A. Dalk & Company, Respondents,* v. FRANK D. BLACK, INCORPORATED, *Respondent,* R. ROWNTREE *et al., Appellants.*[1]

CONTRACTS (86)—CONSTRUCTION—BUILDING CONTRACT. Proposals by a sash and door factory to furnish all window frames for a building do not include the priming coat, which the specifications required should be given before placing, where the proposals did not refer to the specifications or mention the painting.

CUSTOM AND USAGES (6)—EVIDENCE AS TO EXISTENCE OF CUSTOM. The evidence of one witness that it was the custom of the plant with which he was familiar to put a priming coat on window frames and sash does not establish a general custom among mill work manufacturers to do so.

CONTRACTS (86)—CONSTRUCTION—BUILDING CONTRACTS. A proposal by a sash and door factory to furnish all mill work for a building, specifying the list of materials, consisting of doors, window sash frames, and so forth, including "all glass," refers to the glass in the frames and sashes listed, and does not include skylight glass to be set in metallic frames not included in the proposals, or made by the factory.

CONTRACTS (92)—PERFORMANCE—REASONABLE TIME. Where no time is stipulated for the furnishing of mill work for a building, it must be furnished within a reasonable time.

Appeal from a judgment of the superior court for King county, French, J., entered June 16, 1921, in favor of the plaintiffs, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Preston, Thorgrimson & Turner, for appellants.

Christopher Jacobsen, for respondents.

MAIN, J.—The plaintiffs brought this action for the purpose of foreclosing a lien for material which was used in the construction of a building. The defendants were the owners of the property and the principal con-

[1]Reported in 206 Pac. 22.

tractors. The answer of the contractors contains certain admissions and denials, and an affirmative defense in which certain offsets are pleaded. From a judgment sustaining the right of the plaintiffs to recover, the principal contractors appeal.

R. Rowntree and G. J. Kieburtz, as copartners doing business under the name of the Pacific States Construction Company, sometime during the latter part of January, 1920, contracted with the owner of a certain lot, or lots, in the city of Seattle for the erection thereon of a building. The building was to be constructed of brick, tile and concrete. The respondents were copartners doing business under the name of A. Dalk & Company, and operated a factory in which they made window frames, sash, doors, and so forth. After the contract for the building had been entered into, the appellants contracted with the respondents to furnish the mill work for the building. This contract, while in writing, is somewhat informal and consists of a proposal by the respondents and a letter of acceptance by the appellants.

After the building had been completed, a controversy arose between the parties as to certain items. Upon this appeal three of these are involved. The first contention of the appellants is with reference to the priming coat on the window frames. They claim that this should have been done by the respondents, and inasmuch as it was not done by them and was required by the specifications for the building, that an offset should be allowed for this item. The specifications provided (which were a part of the contract between the owner and the appellants), among other things, that all window frames set in the outer walls should be given a coat of lead and oil before placing. The proposal made by the respondents makes no specific reference to the

specifications. It is addressed to the appellants and recites that "we propose to furnish you the following materials delivered" for a sum named. Below this recital is a list of materials which it is proposed to furnish, which consists of doors, window sash frames, and so forth, and specifies in detail the exact items to be furnished and the sizes. It concludes with, including "all glass." The acceptance of this proposal recites a receipt thereof and states that the same is thereby accepted, including the proposal to furnish all glass. With reference to this item, the appellant makes two contentions. First, that the priming coat upon the window frames was a part of the mill work; and second, that, even if the specifications were silent on this point, as a matter of custom the priming coat would be considered a part of the mill work. The specifications do not state that the priming coat shall be a part of the mill work, but only require that the window frames be so prepared before they are placed. The respondents did not contract to furnish the mill work as set out in the specifications, but gave a list of items which they would furnish. In this list and acceptance thereof there is no mention of the painting of the frames before they are set. The rights of the parties as to this point must be determined by the proposal of the respondents and the acceptance by the appellants, and under this contract they were not required to do the priming.

As to the matter of custom, one witness testified on direct examination that it was the custom for the priming coat to be put on by the mill work manufacturer, but on cross-examination stated that he did not know this to be a general custom, but that it was only the particular custom of the plant with which he was familiar. This testimony would not sustain a finding that there was a general custom which would require

the respondents to put on the priming coat when the contract between the parties was silent upon the matter.

The second contention of the appellants is that the court should have allowed their offset for skylights which were set, not in wood, but in metallic frames. The frames for the skylights were not furnished by the respondents. They were not manufacturers or dealers in metallic frames or in glass. The proposal to furnish all glass necessarily referred to such glass as was necessary to be set in the frames and sashes which the respondents were to manufacture and deliver. It would be extending the contract beyond the plain intent of the parties to construe it as placing an obligation upon the respondents to furnish the skylights, which, as already stated, were set in frames which were metallic and which were not furnished by the respondent.

The last contention is that the offset for damages claimed to have been caused by the delay of respondents in furnishing the mill work should have been allowed. The contract contained no time as to when the material should be delivered, and consequently, under the law, it was necessary that it be delivered within a reasonable time. Upon the question as to whether the respondents failed to deliver within a reasonable time, and by reason of this fact the delay in the completion of the building was caused and the appellants thereby damaged, the evidence is not harmonious. That of the appellants would sustain a finding that the respondents had not delivered the window frames within a reasonable time and thereby caused the delay and damage. The evidence on behalf of the respondents sustains a finding that the material was delivered within a reasonable time. Without reviewing this evidence in detail, it may be said that we are disposed to adopt the view of the trial court and deny a recovery upon this item.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, HOLCOMB, and HOVEY, JJ., concur.

[No. 16651. Department Two. April 3, 1922.]

THE STATE OF WASHINGTON, *on the Relation of George Schleif et al., Plaintiff*, v. THE SUPERIOR COURT FOR OKANOGAN COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN (15, 39)—PRIVATE WAY OF NECESSITY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain an order adjudging a private way of necessity, where it is shown that there is no practical or feasible route out other than the one proposed.

Certiorari to review a judgment of the superior court for Okanogan county, Neal, J., entered July 19, 1921, adjudging a reasonable necessity in condemnation proceedings for a private way. Affirmed.

P. D. Smith, for relator.

Adams & Vincent, for respondents.

MAIN, J.—This case is brought here by writ of certiorari, to review an order of the superior court adjudging that a reasonable necessity existed for the condemning of a private way of necessity across lands owned by the relators. The respondents are the owners of Driscoll Island, in Okanogan county, which consists of approximately 170 acres of land lying in triangular shape between Similkameen river on the west and the Okanogan river on the east and south, and a slough or arm connecting the two rivers on the north. Both the slough and Okanogan river can be forded by teams at all times except during a period of high water

[1]Reported in 205 Pac. 1046.

of from four to eight weeks. It is not practicable, and probably not possible, to ford either the slough or the river with automobiles or trucks. During high water the only way of reaching Driscoll Island is by boat. The respondent and his family reside on the island, and the land thereof for many years has been devoted largely to the raising of hay, but portions of it are well adapted to the growing of fruit and other products that may be grown in the Okanogan Valley. The land of the relator is north of that of the respondent, the two tracts being separated by the slough. It does not seem to be contended but that the respondents are entitled to a means of going from the island to an established highway. The road proposed by the respondents, and which the trial court sustained, goes to the north, crossing the slough and across the land of the relator for a distance of about one-half a mile, and leads directly into the town of Oroville. The route which the relators contend should be taken is to the east, crossing the Okanogan river at some point beyond, connecting with the highway leading to Oroville. Before the respondents are entitled to condemn a private way of necessity they are required to show a reasonable necessity for the proposed road and that they have not any other practicable or feasible way out. *State ex rel. Carlson v. Superior Court,* 107 Wash. 228, 181 Pac. 689, and *State ex rel. Stephens v. Superior Court,* 111 Wash. 205, 190 Pac. 234.

The trial court found that the road proposed by the respondents was the only "practicable outlet from plaintiffs' [respondents'] said premises to a public road." It is necessary to inquire whether the road proposed by the respondents is the only practicable or feasible one by which the respondents will have access to a public highway. Any way out would require

either the bridging of the slough or the Okanogan river. A bridge across the slough would be practically 150 feet long, and that across the river approximately 285 feet, with approaches of from 75 to 100 feet. The cost of bridging the slough would be approximately $1,500, and the river, $4,000. If the road to the east were taken, after crossing the river it would be necessary to cross the Great Northern Railway tracks on a curve with a fifteen per cent grade and would result in a very dangerous crossing, even if permission could be obtained for making it. The county engineer, who was apparently a disinterested witness, testified as follows:

"Crossing over the Okanogan is prohibitive from several points of view (S. F. 25): one is the length of a bridge; it will be very nearly twice as long as a bridge crossing the slough, and from that point of view alone it would be very nearly double the expense to construct a trestle bridge across there. Second, you are going to have to provide against any undue current, any flood water that might come down the Okanogan, which you would not in the slough, as there would be no current to speak of; and the third reason is climbing a steep grade to cross the railroad on a curve."

There being no other practicable or feasible road out other than that proposed, a reasonable necessity existed therefor. The case of *State ex rel. Carlson v. Superior Court, supra,* relied on by the relators, is easily distinguishable. In that case the condemnation of a private road of necessity was sought by one who had a way out over other premises which was capable of being made usable at an expense which was within reasonable bounds. It was there held that the petitioner had not maintained the burden of proof that a reasonable necessity existed, and that he had gone no farther than to show that the way which he sought to

condemn was more practicable than the way which he then had, and this was not sufficient to establish a reasonable necessity.

In the present case, as already suggested, the respondents had no other feasible or practicable way out, and therefore a reasonable necessity existed for making the condemnation.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, HOLCOMB, and HOVEY, JJ., concur.

[No. 16871. Department Two. April 3, 1922.]

OSCAR DEAVER, *Respondent*, v. T. W. PATTERSON *et al.*, *Appellants*.[1]

PLEADINGS (145) — MOTIONS — JUDGMENT ON PLEADINGS — EFFECT. Plaintiff's motion for judgment on the pleadings admits not only the allegations of the adversary, notwithstanding a reply denying the same, but also admits the untruth of his own allegations that had been denied.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 31, 1921, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Gates & Helsell, for appellants.

H. A. Martin, for respondent.

MAIN, J.—The purpose of this action is to quiet title to certain real property. The defendants responded to the complaint by an answer which contained admissions and denials and a cross-complaint in which they sought to have title quieted in themselves. The material allegations of the cross-complaint were denied

[1]Reported in 205 Pac. 1044.

by reply. With the issues in this shape the plaintiff made a motion for a judgment on the pleadings, which was overruled. The cause went to trial and resulted in a judgment sustaining the plaintiff's title, from which the defendants appeal.

The respondent had acquired title to the property by deed on the 14th day of May, 1910. The appellants claim title by reason of a sheriff's sale made after judgment in favor of the appellants and against one James Deaver. It is the contention of the appellants that James Deaver owned a beneficial interest in the property and that the respondent held the legal title for his benefit. The motion for judgment on the pleadings will be first considered.

The appellant contends that, by making the motion, the respondent waived his reply, and that, since the answer plead a good defense, he was entitled to judgment. The law with respect to a motion for judgment on the pleadings which is generally approved by the courts is well stated in 31 Cyc. 606, as follows:

"A motion for judgment upon the pleadings is in the nature of a demurrer. It is in substance both a motion and a demurrer. It is a demurrer for the reason that it attacks the sufficiency of the pleadings; and it is a motion for the reason that it is an application for an order for judgment. Like a demurrer it admits the truth of all well pleaded facts in the pleadings of the opposing party, it may be carried back and sustained against a prior pleading of the party making the motion, and the court will consider the whole record and give judgment for the party who, on the whole, appears entitled to it."

Under this rule, when the motion is made the court will consider the whole record and give judgment for the party who appears entitled thereto. The party making the motion for the purpose thereof admits not only the allegations of his adversary, but also the un-

truth of his own allegations that have been denied. Applying these rules, the respondent, when he made his motion, admitted the allegations of the cross-complaint and in effect, so far as his motion was concerned, waived the denials in his reply of the material matter in the cross-complaint. The cross-complaint, if the allegations were true, would entitle the appellants to prevail. The motion, therefore, could not be granted. Even though the allegations of the reply were waived, while considering the respondent's right to a judgment on the pleadings, it does not follow that, when the court considered whether the appellants were entitled to a judgment as the record then stood, they would be waived for that purpose. In considering the right of the appellants to prevail it would be necessary to give effect to all of the allegations of the respondent. If, when the respondent made his motion, his complaint had not stated a cause of action, then the court would have rendered judgment in favor of the defendant. The case chiefly relied on from this court by the appellant is that of the *State ex rel. Brown v. Superior Court,* 15 Wash. 314, 46 Pac. 232. In that case there was a petition and order to show cause and a return thereto. There was no reply to the return. The petitioner made a motion for judgment on the pleadings which was sustained. Upon appeal to this court, in *State ex rel. Murphy v. Brown,* 83 Wash. 100, 145 Pac. 69, the judgment was reversed. When the case returned to the superior court, the petitioner sought to reply to the return, and this was denied him. It was held upon the second appeal, *State ex rel. Brown v. Superior Court,* 87 Wash. 524, 151 Pac. 1126, that the trial court was right in denying the request to file a reply after the motion for judgment on the pleadings had been made and passed upon. That case differs

from this in that there there was no reply to the return at the time the motion for judgment was heard, while here a reply had been filed to the cross-complaint denying, as stated, the material allegations thereof.

Our attention has been directed to no case which holds that, where the plaintiff makes a motion and fails, the defendant is entitled to judgment when the complaint states a cause of action and the affirmative matter in the answer is denied by the reply.

Upon the merits, the trial court found that the respondent was the owner of the property and had been such owner since the 14th day of May, 1910, which was long prior to the time when the judgment was rendered upon which the sale took place and through which the appellants claim title. The evidence would not sustain a finding that the respondent held only the bare legal title and that the beneficial interest was in James Deaver, the judgment debtor of the appellants.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, HOLCOMB, and HOVEY, JJ., concur.

[No. 16948. Department Two. April 3, 1922.]

ERIC RAMLO, *Respondent*, v. FIVE-HUNDRED TAXICAB COMPANY, *Appellant*.[1]

CARRIERS (95) — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. The contributory negligence of a passenger in a taxicab, thrown through a glass partition, is not shown by the testimony of the driver that a third person had said plaintiff would not have gone through the glass if he had been sitting properly.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered August 23, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a taxicab. Affirmed.

McCarthy, Edge & Lantz, for appellant.

Groff & Davis, for respondent.

MACKINTOSH, J.—The respondent, who was a passenger in one of the appellant's taxicabs, sues for injuries to his person and clothing received in an accident which occurred while he was returning home from a road house at five o'clock on Sunday morning. The appellant set up a defense of contributory negligence, claiming that the respondent was intoxicated and while in that condition stood up in the cab while it was in motion, and that the injuries he suffered were the result of his staggering through a glass partition. Verdict was returned for $500.

Appellant alleges three errors; the first two of these errors relate to instructions given upon the appellant's affirmative defense. We have carefully read all the testimony in the case and find nothing in it which entitles the appellant to any instruction upon contribu-

[1]Reported in 206 Pac. 20.

tory negligence, as there was no evidence establishing such negligence. The driver of the cab testified that he could not see what was going on behind him. The testimony of the respondent and his companions was that he was seated in the proper manner and place and that the accident did not occur as alleged in the affirmative defense. The only testimony which might at all substantiate the allegations of the affirmative defense was the testimony of the driver, who said that one of respondent's companions said, in the presence of the respondent, "If Ramlo had been sitting—I do not know he said 'sitting'—like he ought to or something like that he never would have gone through that glass." This one bit of testimony was not sufficient to justify the court submitting any instructions upon the question of contributory negligence. It is therefore unnecessary to determine whether the instructions given were technically correct or not.

The only other error alleged is that the verdict is excessive. We cannot say this, and the judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16991. Department Two. April 3, 1922.]

THE STATE OF WASHINGTON, *on the Relation of United Auto Transportation Company, Appellant,* v. DEPARTMENT OF PUBLIC WORKS *et al., Respondents.*[1]

CARRIERS (1)—REGULATION—CERTIFICATES OF PUBLIC NECESSITY—POWERS OF DEPARTMENT. The department of public works cannot grant a certificate of necessity for a stage route to a certain station, without a hearing, where it was already served by a line running past, and within one hundred feet of the station; in view of the express terms of Rem. Comp. Stat., § 6390.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered November 25, 1921, affirming an order of the department of public works granting a certificate of necessity and convenience for the conducting of an auto transportation service. Reversed.

Leo Teats, for appellant.

The Attorney General and *Raymond W. Clifford, Assistant,* for respondents.

MACKINTOSH, J.—The respondents having granted to George Miller a certificate of necessity and convenience for the conducting of an auto transportation service between Miller Station and Camp Lewis, the relator brought the matter before the superior court, and from a judgment there affirming the order of respondents, has appealed.

The testimony shows that the relator was operating an auto transportation line between Tacoma and Camp Lewis on January 15, 1921, and that by virtue of that fact was entitled to and was granted a certificate covering that route and intermediate points, under ch. 111,

[1]Reported in 206 Pac. 21.

p. 338, Laws of 1921. Miller Station is at the end of the street car line running from Tacoma towards Camp Lewis, and is situated some one hundred yards distant from the Pacific highway over which appellant is operating its busses. In addition to maintaining regular service between Tacoma and Camp Lewis, passing Miller Station at the distance we have mentioned, the respondent also maintains a service consisting of four trips daily over a route from Tacoma to Camp Lewis, by way of American Lake, which passes directly through Miller Station.

It is the relator's contention that, under § 4 of ch. 111, p. 341, Laws of 1921, the respondents could not grant a certificate to Miller in the absence of an order, after a proper hearing before the department, directing the relator to provide satisfactory service, and after a refusal of the relator to obey the order of the respondents to provide additional service, or to change the fares charged passengers. In this case the certificate was issued to Miller without, according to the relator, such a hearing, and without the making of any such order. So far as material, § 4 is as follows:

". . . . The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies, serving such territory will not provide the same to the satisfaction of the Commission, . . ." [Rem. Comp. Stat., § 6390.]

As we read it, the contention of the relator must be sustained, if, as a matter of fact, Miller Station is "territory already served by a certificate holder."

This question of fact must also be resolved in favor of the relator. As we have noted, the relator main-

tains a service from 5 o'clock in the morning until 1 o'clock of the following morning, daily, passing within one hundred yards of the street car terminus, and four times during the day it goes directly through the station in question. Certainly this would constitute Miller Station "territory already served" within the act.

The questions of whether the service is adequate, or whether the rates charged by relator are proper, are questions which, under the law, the relator is entitled to a hearing upon, and it is only after a hearing and an order entered directing the relator to change its schedule or rates, and a refusal by the relator to obey that order, that respondents have power to issue a certificate to some other person to then inaugurate a new service.

For these reasons, the judgment of the superior court sustaining the granting of the order of necessity to George Miller by the respondents is reversed and the commission's order is set aside.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16804. Department Two. April 3, 1922.]

JAMES McDONALD *et al., Respondents,* v. FRED CURTIS *et al., Appellants.*[1]

APPEAL (418)—REVIEW—FINDINGS. Findings by the trial court, upon conflicting evidence, cannot be set aside unless contrary to the preponderance of the evidence.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered October 1, 1920, upon findings in favor of the plaintiffs, in an action to recover real property and to quiet title, tried to the court. Affirmed.

W. E. Southard, for appellants.

N. W. Washington, for respondents.

MACKINTOSH, J.—Respondents, on June 9, 1914, recovered a judgment against one Hites, who was at the time the record owner of real estate in Grant county, the subject-matter of this litigation. On August 21, 1917, the respondents caused execution to be issued on the judgment and this property was sold by the sheriff, bought in by the respondents, certificate of sale was issued to them, and, after the period of redemption, they procured the sheriff's deed. August 5, 1916, Hites conveyed this property by warranty deed to the appellants, which deed was placed on record. The appellants were occupying the property and respondents brought this action to recover possession. The action was defended by the appellants upon the ground that they had purchased the property from Hites in November, 1912, under a contract of purchase; that they had paid the purchase price, and that the conveyance to them in 1916 was in completion of the contract,

[1]Reported in 205 Pac. 1041.

which had never been recorded. Judgment was rendered in favor of the respondents.

At the time of the entry of the judgment in June, 1914, it became a lien upon all the real property then owned by Hites, but they would acquire no greater interest in the property than Hites then had, and if there were a valid, outstanding contract of purchase held by the appellants, the respondents' lien would attach only to such interest as Hites retained.

The trial court found from the testimony that, although the contract of purchase had been entered into in 1912, the contract had been abandoned and that "the defendants failed to establish by a preponderance of the evidence, or by clear and convincing proof, they had carried out the provisions of this contract or made the payments therein provided for". The case presents only a question of fact, and in order to overcome the finding of the trial court, we must be satisfied that the testimony preponderates against it. This we cannot do, as there are numerous circumstances which must lead us to the conclusion that the finding of the trial court is correct. It is unnecessary to review all these facts and circumstances, which must have convinced the trial court, as they have convinced us, that the conveyance in 1916 to the appellant Fred Curtis, who was the brother of Mrs. Hites, was not in pursuance of the contract of 1912, and that that contract had been abandoned and all rights under it abrogated. For this reason, we affirm the judgment.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16726. Department One. April 3, 1922.]

SUNNYSIDE LAND & INVESTMENT COMPANY, *Appellant*, v. JOHN D. BERNIER *et al.*, *Respondents*.[1]

BROKERS (4, 19)—CONTRACTS—AUTHORITY—"EXCLUSIVE RIGHT"—NEGOTIATIONS DIRECT WITH PRINCIPAL. A contract giving brokers the "exclusive right to sell" real property for a certain period of time, without negativing the right of the principal to sell the property himself, is not violated by a sale by the principal, during such time, and such a sale does not render the principal liable for commissions where the purchaser was not procured by, or a customer of, the broker.

SAME (4, 19). In such a case, a further provision that the owner agrees that he will pay commissions, "in case of sale," or if the broker is instrumental in finding a purchaser, does not negative the right of the owner to make a sale.

Appeal from a judgment of the superior court for Yakima county, Nichoson, J., entered June 4, 1921, upon the verdict of a jury rendered in favor of the defendants, in an action for a broker's commissions. Affirmed.

Stephen E. Chaffee and *R. John Lichty*, for appellant.

Richards, Fontaine & Gilbert, for respondents.

FULLERTON, J.—On October 2, 1920, the respondents, Bernier, owned a tract of land situated near Sunnyside, in this state. On the date given, they listed the same for sale with the appellant, Sunnyside Land & Investment Company, a real estate broker. The listing agreement was in writing and was to the following effect:

"This agreement made and entered into this 2nd day of Oct., 1920, by and between John D. Bernier of Outlook, Washington, party of the first part, and the

[1]Reported in 205 Pac. 1041.

Sunnyside Land & Investment Company, a corporation, having its principal office and place of business at Sunnyside, Washington, party of the second part:

"Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar ($1) to him in hand paid by the second party, the receipt whereof is hereby acknowledged, and of the services to be performed by the second party as hereinafter stated, does hereby give and grant to the second party for a period of 3 months from date hereof, and thereafter until withdrawn by 15 days written notice, exclusive right to sell the following described real property situated in the County of Yakima, State of Washington, to-wit:

"N½ of SW¼ lying east of 29.68 Govern. lateral, in section 17, Township 10 North, Range 22 E. W. M., containing 44 acres, subject to the contract entered into with the Sunnyside Water Users' Association, a corporation, for water right for said land on which there has been paid $—— per acre, and also subject to contract for an additional water right with the United States of America on which there has been paid $10 per acre, on the following terms, to-wit:

"Purchaser assumes drainage.

"The purchase price of said property to be $300.00 per acre, on which the sum of equity is to be paid when abstract of title is furnished showing marketable title except as herein stated, and balance to be paid as follows: ———— with interest at the rate of 6 per cent per annum, payable annually. The purchaser to assume the balance due on water right for said premises in addition to said payments.

"There is a mortgage for $7,000-$1,000 per year against said property, which the purchaser shall assume and agree to pay as part of the purchase price.

"Contract for deed to be given and the purchaser may at his option when one-half of the purchase price has been paid, demand a deed and give back notes secured by first mortgage for balance of purchase price. Contract to be executed by first party on above terms as soon as purchaser is found.

"The second party in consideration of the premises hereby agrees that it will endeavor to sell said premises, and the first party in consideration of said agreement and the payment of one dollar ($1) does hereby agree to and with the second party that he will in case of sale, or if said second party is instrumental in finding a purchaser, pay said second party a commission on the selling price of five per cent."

Prior to the expiration of the agreement, the respondents sold the land to one James Robinson. They refused to pay the broker the commission provided for in the listing contract, and this action was instituted to recover the same. The case was tried by the court sitting with a jury, and resulted in a verdict and judgment in favor of the respondents.

It was a question in the court below whether Robinson, to whom the respondent sold the property, was a customer procured by the appellant, and the appellant in this court argues that he was, but the evidence on the question is conflicting and was resolved by the jury in favor of the respondents. This concludes the question here.

The remaining question is, was the listing contract of such an exclusive nature as to entitle the appellant, on a sale of the property during the life of the contract, to the commission named therein, regardless of the fact whether it was or was not the procuring cause of the sale.

It is a general rule, supported by practically unanimous authority, that where an owner of property does nothing more than list his property with a broker for sale on commission at a stated price, the broker is entitled to his commission only when he is the procuring cause of the sale; that such a listing does not prevent the owner from selling the property to a purchaser of his own procuring, or render the owner liable to the

listing broker for a commission if he does so sell. When the owner gives to the broker the exclusive agency to sell, the authorities are not so unanimous as to the liability of the owner. The weight of authority is, perhaps, that the owner is liable for the commission when he sells the property during the life of the contract, even though to a purchaser of his own procuring. There are, however, authorities which have adopted the contrary rule, and we have heretofore aligned ourselves with them. In *Hammond v. Mau,* 69 Wash. 204, 124 Pac. 377, 40 L. R. A. (N. S.) 1142, we used this language:

"If a contract is silent as to the character of the agency, the owner is entitled to sell without making himself liable for the payment of commissions, and many cases go so far as to hold that, if the contract provide that the broker shall have an exclusive right to sell, but does not in terms inhibit the principal from selling, the contract is not violated if the principal sell to one who is not a customer of the broker. It is only where an exclusive agency is granted upon sufficient consideration, or it is plainly the intent of the parties that the agency shall be exclusive, that the principal is liable when he makes the sale on his own account."

In *Brownell v. Hanson,* 109 Wash. 447, 186 Pac. 873, the contract appointed the brokers "sole agents for the sale" of the property for a named period. The case was determined upon other grounds, but we again said:

"We would be inclined to hold, in accordance with the minority of the courts, that a contract giving the broker exclusive authority to find a purchaser for property, but not negativing the right of the principal to sell the property himself, is not violated by a sale by the principal, and in the event of such a sale, the agent is not entitled to a commission."

In *Keith v. Peart,* 115 Wash. 552, 197 Pac. 928, the brokerage contract gave the broker the "exclusive

agency" for the sale of the property, but did not negative the right of the owner to sell during the life of the contract. The owner made a sale of the property during such time, and the broker brought the action to recover commissions. In the complaint he alleged that he was the procuring cause of the sale. The answer denied the allegation, and on the trial the court held this question to be immaterial, construing the contract as one entitling the broker to his commission if the property was sold by the owner during the life of the contract, regardless of the procuring cause, and directed a judgment in his favor. This we held error, using this language:

"The written authority given the respondent [the broker] made him an exclusive agent, but did not negative the right of the principals to sell the property themselves . . . This is the test in this case. It is a question as to whether or not the respondent was the efficient, procuring cause of the sale to Shook, . ."

There is, however, a difference in the wording of the contracts in the cases to which we have referred and the wording of the contract in the present case. In the second of the cited cases, the brokers were appointed as "sole agents" for the sale of the property, and in the third they were given an "exclusive agency" for the sale, while in the present case they are given the "exclusive right" to sell. Based upon this difference in language, the appellant contends for a difference in rule, arguing that the phrase "exclusive agency" has not the same meaning as the phrase "exclusive right", and that, where the broker has a contract giving him the exclusive right to sell the property of his principal, he has the right to his commission, even though he might be denied the right if the contract was only one of exclusive agency. But we

cannot think there is any essential difference in the contract, no matter which of the phraseologies is used. Primarily, the contract is, in each instance, one agreeing to pay a commission in the case the broker procures a purchaser for the listed property, able, ready, and willing to take it on the terms the owner offers it for sale, and if the grant of an exclusive agency for that purpose means, as the rule adopted by us presupposes, that the owner will not list the property with another agent during the life of the agency, the grant of an exclusive right can mean no more.

The concluding clause of the contract, it will be observed, provides that the broker will endeavor to sell the premises, and that the owner agrees to and with him "that he will in case of sale, or if the second party is instrumental in finding a purchaser," pay the broker a stipulated commission. It is argued that the language quoted from this clause of the contract renders the owner liable in the case of a sale, regardless of who was the procuring cause of the sale. But it is manifest, we think, that the language means a sale to a customer procured by the broker, and is without reference to a sale with which the broker has nothing to do.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16957. Department One. April 5, 1922.]

S. H. COHEN, *Respondent*, v. R. S. ROBINSON, *Appellant*.[1]

PRINCIPAL AND AGENT (19, 21)—MUTUAL RIGHTS AND LIABILITIES—ESTOPPEL—NEGLIGENCE OF AGENT—RATIFICATION—WAIVER OF CLAIM AGAINST AGENT. There is an implied ratification by the principal of the acts of his agent in purchasing furs contrary to instructions when the principal himself takes control of the furs and disposes of them in a distant market; and any claim against the agent for loss sustained in the transaction is waived by the principal's failure, until a suit is started against him for the recovery of unpaid salary, to advise his agent that the furs had been sold at a loss or that he had any intention of holding the agent responsible for such loss.

APPEAL (452)—REVIEW—HARMLESS ERROR—ERRORS NOT AFFECTING TRIAL DE NOVO. Error in receiving evidence on an issue not pleaded is harmless where the same result is reached by considering the evidence not objected to.

Appeal from a judgment of the superior court for King county, French, J., entered August 24, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

George H. King and *M. H. Van Nuys*, for appellant.
Philip Tworoger, for respondent.

MITCHELL, J.—For a number of years the defendant, a fur dealer of Winnipeg, Canada, employed the plaintiff as his agent in Seattle for the buying of furs. On February 5, 1921, this action was commenced to recover for the agent's unpaid salary from May 15, 1920, to October 15, 1920. In his answer the defendant denied the agency for the period mentioned and, among other things, affirmatively set up a counterclaim for

[1]Reported in 205 Pac. 838.

damages, in that in March, 1920, contrary to instructions, plaintiff, as agent purchased certain furs on which the defendant sustained a loss. This was denied by a reply. On the trial of the case the defendant admitted the agency and salary for the period covered by the complaint, and that it had not been paid; whereupon the case was tried, without a jury, on the counterclaim. From findings, conclusions and judgment against the defendant, he has appealed.

The only loss claimed to have been sustained was on 722 muskrat skins included in the purchase. It appears that, on March 15, 1920, appellant, by wire, directed his agent not to buy any more furs without instructions. Contrary thereto, the agent agreed to buy a quantity of furs from a Seattle dealer on or about March 23, 1920. On March 26, the agent paid for the goods, telegraphed that he had made the purchase, and wrote to the appellant, enclosing the invoice of the goods purchased, stating that he could not resist buying, as he thought it a good buy and that he tried to get an option to purchase, but could not do so. On the next day, March 27, he received a night letter from the appellant saying he did not want the goods, that he, the agent, had bought them against instructions, and to cancel the deal. On that day, answering the night letter, the respondent wrote to the appellant saying he was sorry about the matter, and further stated,

"I didn't cancel the deal, as I had already paid him yesterday, even I hadn't have paid Woodruff I wouldn't have canceled anyhow because that would queer us from doing business. I am leaving the goods with Woodruff and told him to try and get us a little profit, he has another 300 rats a little better than ours he wants $3.00 each. I am satisfied that the 722 rats were bought about 15% cheaper than Tacoma sale. Another reason prompted me to buy those rats was, I

was informed around town that rats is holding up well and I was afraid of losing the chance so I closed the deal."

Upon receipt of this letter appellant, on March 31, telegraphed that the furs be shipped to Winnipeg. They were promptly shipped as ordered. On that same day, March 31, 1920, the appellant wrote to the respondent, among other things, as follows:

"I am rather surprised, after you found you couldn't cancel Woodruff's deal, or didn't care to do so that you held the goods back without any instructions to do so . . . If in your opinion there was a possibility of selling the goods favorably at Seattle, it appears to me the first thing you should have done was to wire asking me whether such action would meet with my views . . .";

and further in the same letter, as follows: "I will advise you just as soon as I am open for any more goods which I hope will be in about thirty days. Meantime, if anything really special turns up, you can submit it to me, but in no case buy anything at any price without submitting."

After receipt of the goods in Winnipeg, the appellant held them until October, 1920, and sold them at a loss, which he now seeks to recover from his agent. While it is quite true, because of the character of the agency, the appellant was bound to stay by the contract of purchase, it is significant that, so far as any liability of the agent was concerned, there never was any claim or suggestion by the appellant that he would hold the agent responsible for any loss, although the agency continued for six or seven months thereafter. Upon learning that the agent, because of the night letter to cancel the order, had instructed the dealer in Seattle from whom the goods were purchased to sell them at a profit, the appellant ordered them shipped to Winnipeg. That, of course, he had the right to do because they were his

goods, but it is worthy of consideration in connection with appellant's conduct indicating implied ratification, or rather waiver, of any claim against the agent in case any loss was suffered. For the same purpose, it is to be noticed that other furs in the same purchase were in no way accounted for or subsequently mentioned by the appellant. If sold at a profit he kept it and seeks to charge the loss on the rat skins to his agent. On selling the rat skins in October, 1920, he did not then advise the respondent of his loss, nor at any time or in any manner claim or pretend any liability against the respondent until his answer in this law suit, which was verified by him on May 2, 1921—more than a year after the transaction, and more than six months after he knew what his loss was.

There is in the case no claim of fraud on the part of the agent, nor anything other than good faith on his part in making the purchase. Unquestionably, he thought, although disobeying instructions, that he was making a good deal for his principal, and while that would not absolve him from liability, yet we think the conduct of the appellant, upon learning all the facts, including his long silence as to any responsibility of the respondent, broken only in the law suit against him, does relieve the agent. Some contention is made that the respondent is not permitted to rely upon the doctrine of ratification, as it was not plead; but let that be as it may, we have considered in reaching our conclusion only the testimony introduced by the appellant, together with a portion of that on behalf of the respondent that was neither objected to nor disputed.

A number of authorities are cited in the respective briefs which are not specially helpful here, other than to observe they all lead to the well-settled rule, tersely stated in appellant's brief, that "waiver is a question

of intention." That is, each case is one unto itself. Tested by that rule, we conclude the trial court reached and adopted the proper findings, conclusions and judgment in this case.

Affirmed.

PARKER, C. J., HOVEY, and FULLERTON, JJ., concur.

[No. 16693. Department One. April 5, 1922.]

DETTA McDONALD, *Appellant*, v. KING E. McDONALD *et al., Respondents.*[1]

DISCOVERY (10)—PLEADING (134-1)—BILL OF PARTICULARS—DISCRETION OF COURT—EXCUSE FOR DELAY. A reasonable excuse for delay in furnishing a bill of particulars and answering interrogatories, where no prejudice resulted and the failure was not willful, warrants the court in exercising its discretion and should not preclude the party from giving evidence as to the matters.

APPEAL (438)—HARMLESS ERROR—PLEADING—DEMURRER. Error in refusing to sustain a demurrer to an affirmative defense is cured by excluding the evidence.

EXECUTORS AND ADMINISTRATORS (146)—CLAIMS—SET-OFF. One sued by an executrix of the estate may plead as an offset a claim against the deceased, without having presented a claim against the estate, although it is limited to extinguishment of the debt.

EVIDENCE (99)—WITNESSES (48)—SELF-SERVING STATEMENTS—TRANSACTION WITH DECEASED—BOOKS. In an action by an executrix, involving a mercantile partnership account, defendant's identification of the books, kept in the usual course of business, is not objectionable as evidence of transactions with the deceased, nor as self-serving.

PARTNERSHIP (23, 96)—ACCOUNTING—CHARGES AND CREDITS—INTEREST ON ADVANCES—RESULT. It is not error to refuse to allow interest on advances made by the partners, upon striking the partnership account, where excess initial advancements by one partner would be offset by his excess withdrawals and it is not shown that the interest due one would materially exceed that due the other.

[1]Reported in 206 Pac. 23.

PLEADING (104)—AMENDMENTS—TO CONFORM TO PROOF. Where the evidence on a third cause of action for money loaned to a partner showed that the money was loaned to the firm and used by it, the court may treat defendant's answer admitting the loan to him as an inadvertence.

EXECUTORS AND ADMINISTRATORS (146)—CLAIMS—COUNTERCLAIM. In an action by an executrix, it is error to give an affirmative judgment on a counterclaim in excess of plaintiff's claim, where no claim was presented against the estate as required by the statute of non-claim.

PARTNERSHIP (23-32)—MUTUAL RIGHTS—LIABILITY ON NOTE TO PARTNER. A partner executing, as co-maker, a partnership note to his co-partner for the purpose of borrowing money for the use of the partnership (of three members) is liable as a co-maker for the whole sum, and it is error to confine his liability to one-third thereof.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 20, 1921, upon findings in favor of one defendant, in an action on a promissory note and for money received, tried to the court. Reversed.

Robert A. Devers, for appellant.

Wesley Lloyd, for respondents.

FULLERTON, J.—In this action the appellant, in her individual capacity and as the executrix of William J. McDonald, deceased, sought to recover from the respondents the sum of $3,634.89. Three separate causes of action were set forth in the complaint. In the first, recovery was sought upon a promissory note dated July 28, 1916, for the sum of $2,500, made payable to William J. McDonald, and signed as makers by a partnership doing business under the firm name of McDonald-Goodwin Company, and by the respondent King E. McDonald. It was alleged that this partnership was composed of King E. McDonald and another; that the partnership, subsequent to the execution of

the note, purchased the capital stock of a corporation known as the "A Street Garage," changed its name to McDonald-Goodwin Company, conveyed to the corporation the partnership property, in consideration of which the corporation assumed and agreed to pay the note, and thereafter did pay on the note the sum of $1,250. It was further alleged that King E. McDonald and his associates, in April, 1919, formed a corporation under the name of Puget Sound Motors Company, for the purpose of taking over the assets and assuming the obligations of the corporation McDonald-Goodwin Company; that the corporation so formed, immediately upon its incorporation, did take over the assets and assume the obligations of the McDonald-Goodwin Company, and particularly the obligations due William J. McDonald. It was alleged that there was a balance due upon the note of $2,032.99, and judgment was demanded against all of the defendants for this sum, together with a reasonable attorney's fee.

For a second cause of action it was alleged that, in 1918, the appellant's testator, William J. McDonald, intrusted to the defendants McDonald-Goodwin Company and King E. McDonald a Mitchell automobile to be sold for the sum of $800, for and on behalf of William J. McDonald; that the automobile was so sold for $800 and that the defendants accounted for the sum of $462.50 of the selling price, but no more. Judgment is demanded on this cause of action for the difference between the selling price and the amount accounted for.

For a third cause of action it is alleged that, on March 30, 1918, William J. McDonald, at the request of King E. McDonald, advanced to King E. McDonald and the corporation McDonald-Goodwin Company the sum of $1,100, no part of which had been repaid except the sum of $44. On this cause of action judgment was

demanded for the sum of $1,228.40. Appropriate allegations were made showing the death of William J. McDonald, the appointment of the appellant as executrix of his will, and her right to sue in her representative capacity.

The respondents answered separately, the answer of the corporations being in substance a general denial. The defendant King E. McDonald, in answer to the first cause of action, averred that the partnership of McDonald-Goodwin Company consisted of himself, William J. McDonald and one N. L. Goodwin, each owning a third interest in the business. He admits the execution of the note set out in the first cause of action contained in the complaint, but avers that the money borrowed for which the note was given was borrowed by the partnership and used in the conduct of the partnership business; admitting substantially the allegations of the complaint with reference to the formation of the corporations therein named, the transfer to them of the partnership business and assets, and the assumption by the corporation of the partnership indebtedness. Answering the second cause of action, he denied that the automobile therein mentioned was intrusted to him personally, and avers that it was intrusted solely to the partnership of McDonald-Goodwin Company; that it was sold by the company and that the proceeds of the sale were duly accounted for to William J. McDonald.

Answering the third cause of action, he admitted borrowing from William J. McDonald the sum of $1,100, and denied each and every of the other allegations therein contained, save that $44 had been paid on account thereof.

As a cross-complaint, he set up two causes of action against the plaintiff. In the first he alleged the death

of William J. McDonald; that he died testate, naming the plaintiff as executrix of his will, to act as such without the intervention of the court; that William J. McDonald had bequeathed to him in his will the sum of $4,000; that the executrix had not paid the bequest, although she had ample funds so to do.

For a second cause of action he alleged that, for a number of years prior to December 5, 1918, he and William J. McDonald conducted as partners a mercantile business at Thorp, Washington, the assets of which exceeded $10,000, in which he had a one-half interest; that William J. McDonald died on the day named, and that the partnership property passed into the hands of the appellant as executrix of his will, and that she had failed, neglected and refused to account to him for his interests therein. The prayer of his answer was that the appellant's cause of action be dismissed; that he have judgment against her for the amount of the legacy bequeathed to him by William J. McDonald; and that an accounting be had of the partnership property in the hands of the appellant, and that he have judgment against her for the amount found to be due upon such accounting.

The action was tried by the court sitting without a jury. The court made findings of fact in which he found, as against the corporations, that they were liable for the unpaid balance due upon the note set out in the appellant's first cause of action, and liable for the payment of the money loaned as set forth in the third cause of action; further finding that the proceeds of the sale of the automobile mentioned in the second cause of action had been fully accounted for. As against the respondent King E. McDonald, the court found him liable for the payment of one-third of the balance due on the note set out in the first cause of ac-

tion, and that the one-third thereof amounted to the sum of $708.80; found that he was not liable on the second and third causes of action; and found on the partnership accounting that the executrix had in her hands money belonging to him in the sum of $1,343.20. As to the legacy, it found that it was without jurisdiction to enter a judgment with reference to it.

Judgment was entered against the corporation defendants for the amount found due on the first and third causes of action set out in the complaint. As to the defendant King E. McDonald, judgment was in his favor for $634.40, the difference between the amount found due him on the accounting and the amount found against him on the note set out in the first cause of action. The appeal is from the judgment entered in favor of the defendant McDonald.

The appellant demurred to the respondent McDonald's affirmative answers, which the trial court overruled. She then moved for a bill of particulars with respect to the mercantile accounting and submitted interrogatories on the same matter. Errors are assigned on the overruling of the demurrer to the affirmative answers, and on its rulings relating to the bill of particulars and to the interrogatories. Regarding the latter, we cannot think the objections merit special consideration. The bill of particulars was furnished and the interrogatories were answered, the objection being that the one was not timely furnished nor the others timely answered. But an excuse was offered for the delay, sufficient, we think, to warrant the court in exercising the discretion it has in such matters. The penalty the statute imposes for failure to comply with a demand for a bill of particulars, or to answer interrogatories, is severe; it precludes the party from offering evidence on the matters to which they relate.

Where, therefore, the failure to comply strictly with the statute is not wilful or contumacious, and the opposing party is in no manner injured by the delay, a reasonable excuse for the delay ought to suffice, and here, as we say, such an excuse was offered.

The demurrer to the first of the affirmative defenses possibly should have been sustained. But, as the court subsequently sustained the appellant's objections and refused to enter a judgment thereon, any error it may have committed in refusing to sustain the demurrer was cured.

The demurrer to the second defense was also properly overruled. It was founded on the ground that it did not appear that the respondent had presented, within the time limited by the statute, a claim therefor to the appellant as executrix of William J. McDonald's estate. The argument of the appellant is that without such presentation the claim could not be used as a basis for affirmative relief against the estate, nor as an offset to any claim the estate might have against the claimant. These questions, however, are not here as questions of the first instance in this court. In *First Security & Loan Co. v. Englehart,* 107 Wash. 86, 181 Pac. 13, the question was whether a claimant could recover against an estate, administered under a non-intervention will, without first presenting his claim to the executor in the form prescribed by the statute, and it was held that he could not. The case is fully considered and needs only to be referred to for the reasons which compel the conclusion. On the other hand, we have as emphatically declared that an unpresented claim may be used as an offset against a demand the estate seeks to enforce against the claimant if it existed at the time of the death of the executor's decedent, although it is limited to the extinguishment of the debt.

Fishburne v. Merchants' Bank of Pt. Townsend, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848; *Mendenhall v. Davis,* 52 Wash. 169, 100 Pac. 336, 17 Ann. Cas. 179, 21 L. R. A. (N. S.) 914. It follows that the matter pleaded while not available as a basis for affirmative relief, was a valid plea as an offset to the appellant's demand.

The next assignment of error is that the court allowed the respondent to testify to transactions had with the deceased, William J. McDonald. The testimony thought to be objectionable on this ground related to books of account pertaining to the mercantile business conducted at Thorp. The defendant was permitted to identify the books, and permitted to offer them in evidence after stating that they were kept by himself and his wife. But they were books of the mercantile concern, kept in the usual course of business, and hence in no manner self-serving. To allow the defendant to identify them and to use them as evidence in his own behalf in no manner violated the rule of the statute.

The next assignments of error to be noticed question the sufficiency of the evidence to justify the finding that there was a balance due the respondent from the mercantile business. The evidence on this is largely documentary, and it was from this evidence that the court made up his findings. On the general question, we have no hesitancy in saying that the evidence was sufficient to justify the court in striking the account. It is complained further, however, that the account as struck by the court is erroneous in that he did not allow interest on the original advancements made by the parties. As William J. McDonald made much the larger initial advancement, the allowance of interest, without going further, would much reduce the amount

found due the respondent as the other partner. But, while the partnership was on an equal basis as to profits, the withdrawals made by William J. McDonald greatly exceeded the withdrawals made by the respondent, and the same principle which would allow interest on the excess advancements would justify a charge of interest on the excess withdrawals. It was not shown that the interest on the one would materially exceed the interest on the other, and we cannot find error in the judgment in this respect.

It is assigned that the court erred in refusing to allow judgment against the respondent for the advancement set out in the appellant's third cause of action. It is said that this was error, particularly in view of the respondent's answer thereto. But the evidence clearly showed that this advancement was made as a loan to the corporation, not to the defendant, and that the loan was expended on the indebtedness of the corporation. The court treated the admission in the answer as an inadvertence, and took the evidence and not the answer as speaking the fact. We cannot conclude that it erred in so doing.

From what we have said concerning the demurrer of the appellant to the respondent's second affirmative defense, it is apparent that the trial court erred in entering an affirmative judgment in favor of the respondent. Since the respondent's claim which he sought to offset was not presented to the executrix as a claim against her decedent's estate, it could be used as a set-off only, not as a basis for an affirmative recovery. But we think the trial court erred also in its determination of the measure of the appellant's right of recovery on the note sued upon in her first cause of action. It will be remembered that it held that the measure of recovery was a one-third of the amount due thereon, but we see

no reason why the measure is not the full amount due upon the note. It is true the money loaned was borrowed for the use of the partnership and was used in the partnership business, but the respondent, by signing the note as maker, became individually responsible for the payment of the note. In other words, the parties dealt as strangers to the partnership relation, and by their act isolated the transaction from the general partnership account. In its general aspect, it was an agreement by which King E. McDonald guaranteed William J. McDonald against loss on account of the loan, and no legal reason appears to us why the guaranty should not be made good. The cases, in so far as they have been called to our attention, are chiefly concerned with the right to sue at law in such a case. On this question they are not in agreement, but such of them as have held that the action will lie, have allowed a recovery for the obligation in full. See *Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185.

The transaction set forth in the appellant's second cause of action requires no special consideration. The evidence is clear that the automobile therein was intrusted to the defendants for sale, that they sold it in accordance with the trust and fully accounted to the appellant's testator for the proceeds. No liability, therefore, on account of the transaction attached to any of the defendants.

For the error noted, the judgment must be reversed. There is, however, no necessity for a further trial. The order will be that the account between the parties be recast by charging King E. McDonald with the full amount found due upon the note set forth in the plaintiff's first cause of action and deducting therefrom the amount found due him on the partnership accounting.

Judgment will then be entered for any balance appearing against him.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16585. *En Banc.* April 5, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Andrew Andersen et al., Plaintiff*, v. THE SUPERIOR COURT FOR LINCOLN COUNTY, *Joseph Sessions, Judge, Respondent.*[1]

CONSTITUTIONAL LAW (15, 25)—LEGISLATIVE POWERS—DECLARING PUBLIC USE. The declaration of Const., art. 21, that the use of waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use is not exclusive and does not preclude the legislature from declaring other purposes to be public uses.

CONSTITUTIONAL LAW (26)—EMINENT DOMAIN (11)—LEGISLATIVE POWERS—ENCROACHMENT ON JUDICIARY—DECLARING PUBLIC USE. The provision in Const., art. 1, § 16, that in the condemnation of private property, whether the contemplated use be really public shall be a judicial question, does not preclude the legislature from declaring in the first instance that a purpose is a public one.

EMINENT DOMAIN (13, 20)—PARTICULAR USE—WATER SUPPLY—DOMESTIC PURPOSES. Where the use of water for domestic purposes is the foundation of an agricultural enterprise, and absolutely necessary to carry on a large farm in the semi-arid section, it is a public use and within Rem. Comp. Stat., § 7354, authorizing the condemnation of water for any "beneficial use."

SAME (13, 20)—SUPERIOR NECESSITY. Where the owner has never made any use of small springs, a use for domestic purposes necessary to run a large farm is superior to the owner's use to irrigate an area of less than one acre.

SAME (13, 20). The use of waters not subject to appropriation may nevertheless be condemned for a public use.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., dissent.

[1]Reported in 205 Pac. 1051.

Certiorari to review a judgment of the superior court for Lincoln county, Sessions, J., entered May 31, 1921, adjudging a public use and necessity in condemnation proceedings. Affirmed.

C. M. N. Love and *Oscar Cain,* for petitioners.

Louis A. Dyar, for respondent.

The Attorney General and *Fred J. Cunningham, Assistant, amici curiae.*

Hovey, J.—Certiorari to review an order of necessity made in an eminent domain proceeding, wherein A. S. Campbell seeks to condemn a portion of the supply of water from springs located upon land now belonging to the petitioners, together with the right of way for a pipe line for the carrying of such water. The use of the water alleged is for household, stock and irrigation purposes.

The land is situated in Lincoln county, Washington, in the semi-arid portion of this state, the land of petitioners having upon it springs which are not the source of any stream supply and of which no use has heretofore been made except by plaintiff in this action. The lands of the plaintiff do not have upon them any supply of water, but the plaintiff has successfully farmed a considerable area by dry farming, and for thirty years has obtained his supply of water for domestic and stock purposes through a pipe line to a portion of the springs upon the lands of the petitioners, through which he has been using from three to four gallons a minute. This right has heretofore been exercised by virtue of a lease made by a former owner of the premises with Campbell, but the lease has now expired and the petitioner has refused to renew the privilege. It also appears that the overflow of this supply is used by Campbell in irrigating a small orchard. It is also

established by the evidence that this supply of water is the only one available for this enterprise, and that without it the plaintiff will have to abandon his property as he can no longer live there. The petitioners in this proceeding and their predecessors have never made any use of this water, but petitioners now assert they propose to use it for irrigation.

The case is one of first impression before this court, and the *Attorney General* has filed a brief *amicus curiae* on behalf of the state.

The petitioners make three contentions: (1) That § 4 of ch. 117, p. 448, of the Laws of 1917 is unconstitutional; (2) that the use sought to be obtained is not a public use; (3) that title to the land upon which the springs are situated was initiated by the predecessors in interest of the petitioners prior to the admission of the state of Washington into the Union, and that therefore the rights of petitioners in the property are superior to the provisions of the constitution.

The first and second contentions naturally subject themselves to a common discussion. The law under which this action is brought contains the following, being § 4, ch. 117, p. 448, Laws of 1917:

"The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this act and use the same in common with the former owner, and including the right and power to condemn an inferior use of water for a superior use. In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one: *Provided*, That no property right in water or the use of water

shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity where such land is situated. In any case, the court shall determine what is the most economical method of irrigation. Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations." [Rem. Comp. Stat., § 7354.]

The relevant provisions of our constitution are:

"The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use." Const., art. 21.

"Private property shall not be taken for private use, except for private ways of necessity. . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." Const., art. 1, § 16.

It is contended by the petitioners that, inasmuch as the primary use intended in this action is for domestic purposes, the same is excluded by implication by the use of the words "irrigation, mining and manufacturing." This argument overlooks the fact that the state has sovereign powers except where restricted by the terms of the constitution. *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994. The declaration used unquestionably makes those purposes public purposes, but it does not preclude the state, through its legislature, from declaring other purposes to be also public in their nature, subject, of

course, to the duty of the court to pass upon the question independently of such declaration.

It is also contended that the provision that the question of its being a public purpose shall be a judicial question precludes the legislature from so declaring. We do not so construe the section. The legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded.

It is true that this proceeding cannot be upheld unless the purpose sought can be said to be a public purpose, and in considering this question we have to review a number of decisions from this court. In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 4 Ann. Cas. 987, 2 L. R. A. (N. S.) 842; and *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 7 Ann. Cas. 748, 5 L. R. A. (N. S.) 672, we held that incidental benefits to be derived by the public from the establishment of a private enterprise could not be considered as sufficient to make the intended use a public one. These were not cases, however, where the thing desired could not be obtained elsewhere. In the arid and semi-arid portions of this state water is life itself. The supplies are limited and generally cannot be duplicated. This court recognized the distinction in the case of *State ex rel. Tacoma Industrial Co. v. White River Power Co., supra*, where Judge Rudkin says: "There is, however, a vast difference between the use of water for manufacturing and for irrigation. In the latter case, there is no choice of means or location. The necessity is an absolute one, if the land is to be reclaimed at all." The court there

makes use of the term irrigation, but the same reasoning applies to the use of water for domestic purposes when the domestic purpose desired is the foundation of an agricultural enterprise.

This court, in *State ex rel. Galbraith v. Superior Court,* 59 Wash. 621, 110 Pac. 429, 140 Am. St. 893, has pointed out, on pages 627 and 631, the importance to the state of agricultural enterprises and the essential nature of water in their development in the arid portions of the state; and, as is also shown on page 631 of that case, the fact that the enterprise involved the holdings of only one man does not make it any the less an enterprise of benefit to the public.

Contention is made that condemnation in this case would justify taking a well from one man and giving it to another, but we do not think this follows. The water supply in this case is not created by artificial means, it is a natural one, greatly in excess of the needs of its present owner, and one of which no use has ever been made by the owners of the land where it is situated, and the supply is of such permanence and quantity when so used as to meet what is a public use in the section of our state where it is situated.

It appears from the testimony that no use of this water has been heretofore made by its owners, so the court is free to pass upon the question of superior use without consideration of the exception in favor of a present use by the owner for irrigation. When we consider the question of superior use, we think that there can be no question but that the use of this small quantity of water where it will result in the successful cultivation of a whole farm is superior to its use in the actual irrigation of an area of less than an acre, which is all it could mean to its present owners.

On the third point raised, it seems to us that, when lands of the United States become a part of the domain

of this state, they are subject to its laws unless there is some reserved right or privilege, and none appears in this case. Granting that these waters are not subject to appropriation, they may still be subject to condemnation. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court,* 46 Wash. 500, 90 Pac. 650.

The order under review is affirmed.

HOLCOMB, MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

PARKER, C. J. (dissenting)—As I read the record in this case, it means that Campbell seeks to acquire the water in question primarily for household and stock-raising purposes. It may be that he anticipates using a very small portion of the water for irrigation, but it seems plain that he is not seeking to acquire the water, and would not seek to acquire it, for any such purpose, except for the fact that he needs it for household and stock-raising purposes. If this were an attempt to acquire this water by virtue of the power of eminent domain for irrigation purposes, I would have no difficulty in concurring in the foregoing opinion and resting my concurrence upon the provision of Art. XXI of our constitution providing that "the use of the waters of this state for irrigation . . . shall be deemed a public use." Since the use of water for irrigation is thus by express constitutional provision made a public use, the question of that use of water being a public use is excepted from the judicial question of public use. But we have in this case, as I view it, only the question of whether the use of water for household and stock-raising purposes, by a private individual who will have no public service obligations with reference thereto, is a public or private use. I cannot escape the conclusion that it is purely a private use, since it is not one of those uses expressly declared

by our constitution to be a public use. I think no decision can be found holding such a use to be a public use, in the absence of statute on the subject; and our legislature does not have the power to enact any statute taking from the courts the question of public use; as is plainly shown by the concluding sentence of § 16, Art. 1, of our constitution, quoted in the foregoing opinion.

As to the attempt of Campbell to acquire a right of way for a pipe line to carry the water which he seeks to acquire, I would concede that, were he now the owner of the water he seeks to acquire, or had he the power to acquire the water by virtue of the power of eminent domain, he would then probably have also the right to so acquire a right of way for the carrying of water to his place, upon the theory that such a right of way would then become a "private way of necessity." But since he does not possess the water, and, in my judgment, does not possess the right to acquire the water by virtue of the power of eminent domain, there is no necessity for acquiring the right of way to carry it to his place. For these briefly expressed reasons, I dissent from the conclusion reached by my brethren in the majority opinion.

FULLERTON, TOLMAN, and BRIDGES, JJ., concur with PARKER, C. J.

[No. 16789. Department One. April 5, 1922.]

W. H. DAVIS, *Respondent*, v. THURSTON COUNTY, *Appellant*.[1]

PLEADING (74)—REPLY—DEPARTURE—NEW MATTER—CONSISTENCY. In an action on a county bridge contract for damages for refusal to allow the contractor to complete the work, in which the county alleged failure to complete the contract within the time limit, it is not a material variance for plaintiff to reply that he was delayed and unable to finish the work within the time limited because of inability to obtain cement and because of high waters.

CONTRACTS (148, 161)—PERFORMANCE OR BREACH—EXCUSE FOR DELAY—EVIDENCE—ADMISSIBILITY. Where a county answered to a contractor's complaint that he had abandoned the contract after failing to complete the work on time, and there was evidence tending to show waiver of the time limit, evidence that the delay was caused by high water and inability to obtain cement is admissible as tending to disprove abandonment.

CONTRACTS (151, 162)—PERFORMANCE OR BREACH—WAIVER OF OBJECTIONS—EVIDENCE—QUESTION FOR JURY. The liability of a county upon a bridge contract, after preventing the contractor from completing the work after the time limit had expired, is for the jury where there was evidence of waiver of the time limit and that the contractor was able and willing to perform, and had not abandoned the work.

DAMAGES (74, 128)—MEASURE OF DAMAGES—BREACH OF CONTRACT—INSTRUCTIONS. Where a contract for the construction of a bridge is breached through no fault of the contractor before completion of the work, the measure of damages, where the contractor does not ask for profits lost, is such proportion of the whole contract price as the amount of work done bears to the whole amount of the work to be done; and it is error to instruct the jury that he would be entitled to reimbursement for his expenses in so far as he proceeded in the performance of the contract and in addition all profits which he would have realized by performing the whole contract.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered August 9, 1921,

[1]Reported in 205 Pac. 840.

upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

R. R. Fullerton and *Thos. L. O'Leary*, for appellant.

Troy & Sturdevant and *Geo. F. Yantis*, for respondent.

Bridges, J.—Suit for damages growing out of a contract for the construction of a county bridge.

On August 16, 1920, the plaintiff and defendant entered into a written contract by the terms of which the former was to construct a certain small bridge for the latter, for which he was to be paid $1,575, and the bridge was to be completed by September 18 of that year. The complaint, after alleging the contract, set out that, while plaintiff was proceeding with the work of constructing the bridge, defendant ejected him from the premises and refused to permit him to complete the work, and made a contract with other parties for the work; that he was at all times ready, willing and able to construct the bridge according to the terms of the contract; that he had expended a large sum of money in doing such of the work as he had performed when he was stopped, and that he had been damaged in the sum of $1,575. The first portion of the answer was in substance a general denial. There was a first affirmative defense which alleged that the plaintiff failed and refused to build the bridge according to the terms of the contract, but, on the contrary, abandoned the work, and for those reasons, and after the time provided in the contract for the completion of the bridge, the defendant let a contract to other parties to build it. A second affirmative defense alleged that such of the work as the plaintiff did before abandoning it was not in accordance with the contract or the plans and specifications, and that such work was done in a

careless and negligent manner, and that the plaintiff did not, in good faith, attempt to perform his contract. The reply admitted that the bridge was not built within the time provided in the contract, but alleged that the defendant had waived the time of completion, and denied that the work had been carelessly or negligently done. It further alleged that the plaintiff was delayed in the work he had done on the bridge by his inability to obtain cement and because of high waters in the stream which was being bridged.

There was a verdict by the jury in favor of the plaintiff in the sum of $1,575. Later the plaintiff elected to, and did, waive any amount of the verdict in excess of $1,271. A judgment was entered in that sum. In its appeal the defendant has raised many questions.

(1) Appellant contends that the complaint and reply are inconsistent, in that the former is based solely upon the idea that the respondent was entitled to recover damages because the appellant refused to permit him to complete his contract, whereas the burden of the reply is that he was delayed in the completion of his contract and unable to finish the bridge within the time provided in the contract because of inability to get certain building materials, and because of high waters in the stream. We do not think there is any material variance. The plaintiff is still seeking to recover for the reasons alleged in his complaint. The reply is merely in response to the allegations of the answer alleging that the respondent did not complete the bridge within the contract period, but, on the contrary, abandoned the work, and that such work as he did was not in accordance with the terms of the contract, and was not done in good faith.

(2) The respondent testified that he was delayed in the construction of the bridge and was unable to finish

it within the contract period because of high waters and inability to obtain cement. All of this character of testimony was received over the constant objections of the appellant. We think the court's ruling was right. It may be the rule that the respondent could not excuse the failure to build the bridge within the contract time because of high water and lack of cement, but this testimony was not offered or received for this purpose. There being some proof tending to show that time had been waived, this testimony was admissible as tending to disprove appellant's allegations that respondent had not proceeded in good faith and had abandoned the work.

(3) The appellant also contends that its motions for nonsuit and for judgment notwithstanding the verdict should have been granted. It charges that there was not sufficient proof that the plaintiff had filed his claim with the appellant, as provided by law. We think, however, that the admissions in the answer relieved the respondent of such proof. It is also said that the motions should have been granted because the testimony shows the respondent abandoned the contract, and that he did not, in good faith, attempt to perform it, even if he had not abandoned it. We cannot agree with these contentions. There was ample testimony to carry the case to the jury, to the effect that the appellant had waived the provisions of the contract concerning the time for the completion of the bridge, and that the respondent was able and willing to construct the bridge in accordance with the contract, and that he had not abandoned the proposition, or failed in good faith performance. These questions were all matters to be submitted to the jury upon proper instructions. If, as the testimony tended to show, although stoutly denied by the appellant, there

was no time within which the bridge was to be completed, and that the respondent had not abandoned the job, but, on the contrary, was proceeding in good faith, then, so far as those questions are concerned, he would be entitled to recover.

(4) Complaint is made of the following instructions given to the jury:

"If you find in favor of the plaintiff in this case, then I instruct you that the plaintiff would be entitled to recover, as damages, the amount of his expenditures in the performance of the contract up to the time of the stoppage, that is to say, he would be entitled to reimbursement for his expense in so far as he proceeded with the performance of his contract, and in addition to his expenses he would be entitled to recover the profits which he would have realized by performing the whole contract, if he had performed it; the plaintiff's recovery, if he recovers at all, should include these two items, namely, the expense incurred in part performance, with a further item of the profits which he would have made by the performance of the whole contract."

The court seems to have taken this instruction verbatim from the case of *Anderson v. Hilker,* 38 Wash. 632, 80 Pac. 848. But the facts of the two cases are so different that the same instruction could, under no circumstances, be proper in both. In the *Anderson* case, the plaintiff was seeking to recover for profits he would have made had he been permitted to complete his contract, while here the respondent did not seek any such recovery, consequently, under the rule of the *Anderson* case, this instruction was wrong because it permitted the respondent to recover lost profits. We will not comment on other specific objections made to this instruction, because we have concluded that it is fundamentally wrong for the same reasons that the instruction approved in the *Anderson* case was fundamentally wrong. In that case Anderson alleged, and his proof

tended to show, that he had a contract with Hilker to move a house owned by the latter, from the town of Ocosta to Hoquiam, for certain agreed compensation; that after he did a part of the work and had gone to considerable expense, Hilker breached the contract. Plaintiff sought to recover on account of his expenditures incurred in part performance and for loss of profits. It was to cover this situation that the trial court gave the instruction which we have quoted. On appeal this court held that the instruction gave the proper measure of damages in a case of that character. We there cited, in support of our position, *Chase v. Smith,* 35 Wash. 631, 77 Pac. 1069.

It is our view now that the measure of damage rule laid down in the *Anderson* case is not only incorrect, but is not in accord with that given in the *Chase* case, *supra.* The facts in the latter case were that Chase entered into an agreement with Smith to paint a number of houses belonging to the latter, and for so doing he was to receive $1,210. After doing a part of the painting, Smith refused to permit Chase to proceed, with the result that the latter commenced suit to recover damages. It will be observed that there is very little difference in the general facts between the *Chase* case, the *Anderson* case and the case at bar. In the *Anderson* case, which says it follows the *Chase* case, the measure of damages approved by the court was that the plaintiff would be entitled to recover as damages " 'the amount of his expenditures in the performance of the contract'," up to the time of the termination of the contract, and in addition thereto any profits " 'which he would have realized by performing the whole contract'." The rule laid down in the *Chase* case was that the plaintiff was entitled to recover for the work done by him at the contract rate, and such

profit as he would have made on the balance of the work had he been permitted to do it. Discussing this question in that case, we said:

"The contractor was entitled to recover for the work performed at the contract rate, and such profit, if any, as he would have made on the balance of the work had he been allowed to complete it. The respondent (contractor) is to be placed in the same condition that he would have been placed in, had he been permitted to proceed without interference. . . . While it may be conceded that, under the instructions as corrected by the trial judge, the value of respondent's labor already performed should be determined according to the contract price, in the proportion that the same as it then stood bears to the entire work which respondent undertook to perform under the original agreement, it was manifest error to give the jury to understand that they might also allow profits on the entire contract."

The difference between the holding in the *Chase* case and that in the *Anderson* case is at once manifest, for in the latter case it was determined that the contractor would be entitled to recover the amount of his expenditures in the performance of the contract, whereas in the former case it was held that he would be entitled to recover at the contract rate for the work he had performed. An illustration will probably show more clearly the difference in the two doctrines. Suppose that A agreed to construct a house for B, in consideration of $1,000. After the work was half done, B wrongfully terminated the contract. Under the doctrine of the *Anderson* case, if A had expended $800 he would be entitled to recover that amount, even though he had done but half the work. Under the doctrine of the *Chase* case, A would be entitled to recover $500, which manifestly would be the correct amount. Where the contractor, as here, does not seek to recover any profits lost because of being prevented from complet-

ing his work, he would be entitled to recover such proportion of the whole contract price as the amount of the work done by him before the contract was terminated bears to the whole amount of work to be done by him under the contract. For example, if he has completed one-half of all the work to be done, he would be entitled to recover one-half of the contract price. As was said in the *Chase* case:

"A recovery at the contract rate for the labor performed must necessarily include the profit made by such labor, . . ."

To fix the amount of recovery by a contractor as "the amount of his expenditures," as held in the *Anderson* case, or the reasonable value of the services performed, as held by some cases, would often work a great injustice. Under either of those rules a contractor might recover all, or even more, than the whole contract price, even though he may have done but half the work contracted for; or, on the other hand, he might be deprived of recovery for such profits as he may have made during his partial performance.

In discussing the *Chase* and *Anderson* cases, we have noted only the features concerning recovery on account of partial performance, and have not noticed those portions concerning profits which might have been made if the contract had been completed. The last mentioned feature is not involved here.

We have been unable to find any of our decisions which have followed or approved the doctrine of the *Anderson* case, but we do find that the doctrine of the *Chase* case has been cited and approved in the following cases: *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032; *Gould v. McCormick*, 75 Wash. 61, 134 Pac. 676, Ann. Cas. 1915 A 710, 47 L. R. A. (N. S.) 765; *Dyer Bros. Golden West*

Iron Works v. Pederson, 112 Wash. 390, 192 Pac. 1002; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740.

We feel it necessary to, and we do, overrule the case of *Anderson v. Hilker, supra*, in so far as it is inconsistent with what we have here said.

Judgment reversed and cause remanded for new trial.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 17011. Department One. April 5, 1922.]

W. F. JAHN & COMPANY, *Respondent*, v. PUYALLUP & SUMNER FRUIT GROWERS CANNING COMPANY, *Appellant*.[1]

SALES (75)—PERFORMANCE OF CONTRACT—INSPECTION AND APPROVAL—FRAUD—EVIDENCE—SUFFICIENCY. A buyer having the privilege of calling for inspection at the point of delivery, its acceptance of and payment for cars of hay without such inspection affords no support for a charge of fraud in the certificate of inspection issued at point of shipment.

SALES (42)—CONTRACT—MODIFICATION — EVIDENCE — SUFFICIENCY. A written contract for the sale of hay, subject to the rules of an exchange permitting twenty per cent inferior grade to be tendered, is not modified by correspondence between the parties in which the seller, after several shipments had been rejected by the buyer, gave assurance that the balance of the hay would be satisfactory to the buyer and that the contract would be completed with No. 1 hay.

Appeal from a judgment of the superior court for King county, Hill, J., entered May 20, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Wm. C. Eatough and *M. F. Porter*, for appellant.

Roberts & Skeel and *J. J. Geary*, for respondent.

[1]Reported in 205 Pac. 833.

TOLMAN, J.—Respondent, as plaintiff, brought this action to recover from appellant damages for the breach of a contract to purchase certain alfalfa hay. From a judgment against it for the full amount claimed, appellant has appealed.

The contract, which is in writing, provides for the purchase by appellant of one thousand tons of number one alfalfa hay at $23 per ton, f. o. b. cars Grandview, Washington, subject to Seattle Merchants Exchange rules. "Terms: Draft attached to Bill of Lading, and Grade Certificate." Shipments under this contract were begun in due time, but grade certificates were not furnished with the earlier shipments. Appellant, having contracted the hay to its customers, caused the cars to be diverted and delivered direct to such customers. Complaint was made as to the quality of the hay received, inspections were made at receiving points, and much of the hay found to be under grade. Satisfactory adjustment was made as to some, a number of cars were rejected by appellant, and the return thereof accepted by respondent. After repeated protests as to the quality of the hay, on August 14, 1920, appellant telegraphed respondent as follows:

"We have at Sumner three cars very poor hay two cars that look good at door but we find some of your cars have first class hay at door and rotten hay further back One car contains fifty-seven bales that would not grade anything To repeat our former notice you have cancelled your contract with us by failing to comply with conditions of same."

To which respondent replied by letter of August 17, 1920:

"With reference to the four or five cars of hay that have reached Sumner, which were not satisfactory. We have instructed our man to go down to Sumner and rebill the cars back to Seattle; also to call on you and

show you the exact memo we received from our shippers, stating that the cars were represented to us to be choice hay.

"We have notified our agent not to send any more of the Satus hay on your contract, as we would fill the balance of it from other points in the Yakima Valley.

"We are very sorry that this hay turned out as it did, and can assure you that the balance to complete the contract will be thoroughly inspected and satisfactory to you, and we will be glad to allow you credit for any additional expense you have been put to."

Appellant answered by wire of August 18, 1920:

"If you desire to fill your hay contract with us immediately with first class hay we are willing to accept Shipments from you to date have hurt our business seriously Desire to treat you more than fair but if you send any more cars of poor hay entire contract must be cancelled Wire us what we can expect Must have hay quickly if you are going to ship."

and on the same day respondent replied:

"We will complete your contract with number one hay and have placed orders for immediate shipment to fill all your orders filed with us to date."

Thereafter deliveries continued until October 12, 1920, without further trouble, but on that date a car was received which, according to appellant's inspection, was below grade. It was rejected and appellant then undertook to cancel the contract, and refused to accept further shipments because of the quality of the hay theretofore delivered. There remains undelivered of the one thousand tons contracted for 522.54 tons, and respondent, after due notice, sold this remainder for the best price obtainable and sued for the difference, plus expenses, which, by the judgment entered below, it recovered.

Appellant presents two questions here: (1) were the certificates of inspection fraudulently issued? and

(2) was the contract modified by the letters and telegrams which we have quoted?

We have read the record with care and find therein ample support for the finding of the trial court that, while the earlier shipments were made without inspection and certificate, the buyer had the privilege of calling for inspection at the point of delivery, and its acceptance of and payment for these cars leaves nothing in dispute as to them and affords no support for the charge of fraud. As to the remainder of the shipments which were received by appellant, there is not sufficient evidence that the inspectors did not exercise good faith and honest judgment, and when it is considered that the Seattle Merchants Exchange rules, made a part of the contract, permit twenty per cent of inferior grade to be tendered, it cannot be said that the certificates or any of them were fraudulently issued.

Appellant sought, by trial amendments of its answer, to plead that the contract as originally written was modified, the part relating to the Seattle Merchants Exchange rules eliminated, and a new contract made to the effect that the hay furnished should be satisfactory to the buyer. The refusal of the trial court to permit this amendment is assigned as error. We cannot read the correspondence as establishing, or in any wise bearing out, the defense sought to be predicated thereon. The parties had theretofore agreed upon and signed a written contract, complete in its provisions, and as we read the correspondence, it means nothing more than that the seller thereby promises strict compliance with the already existing contract upon its part, and expressed the opinion that the buyer would be satisfied with the results.

Finding no error, the judgment is affirmed.

PARKER, C. J., MITCHELL, and BRIDGES, JJ., concur.

[No. 16601. *En Banc.* April 6, 1922.]

In the Matter of the Estate of WILLIAM DUNCAN. THE STATE OF WASHINGTON, *Appellant,* v. THOS. N. STRONG, *Respondent.*[1]

TAXATION (226)—INHERITANCE TAX—INTEREST—STATUTES—"NECESSARY LITIGATION." Rem. Comp. Stat., § 11210, tolling the fifteen months within which inheritance taxes must be paid in order to avoid interest charges, if by reason of "necessary litigation" the sum due could not be determined within that period, is not limited to questions concerning the computation, but includes unsuccessful litigation disputing the right of the state to collect the tax.

SAME (226). The fact that the right of the state to collect an inheritance was unsuccessfully contested, does not show that the litigation was not "necessary" within Rem. Comp. Stat., § 11210, tolling the time for payment during "necessary" litigation, where the contest was in good faith and of such doubt as to lead the trial court into error.

Appeal from an order of the superior court for King county, Brinker, J., entered March 24, 1921, in favor of the defendant, in proceedings to determine the interest due on an inheritance tax due from the estate of a decedent. Affirmed.

The Attorney General and *Geo. G. Hannan, Assistant,* for appellant.

C. Henri Labbe and *Wilson & Guthrie,* for respondent.

FULLERTON, J.—The facts involved on this appeal are not in dispute. William Duncan died testate, leaving an estate in this state consisting of money on deposit in a bank. His will devised the estate to certain named trustees to be devoted by them to charitable uses. A controversy arose between the trustees and the state whether the estate was subject to an inherit-

[1]Reported in 206 Pac. 1.

ance tax, and this controversy was submitted to the superior court sitting in probate and determined against the state's contention. The state appealed to this court, where the judgment of the trial court was reversed, our holding being that the estate was subject to the tax. *In re Duncan's Estate,* 113 Wash. 165, 193 Pac. 694. On the return of the remittitur, a new controversy arose. The state contended that it was entitled to interest on the amount of the tax due at the statutory rate from the date of the death of the decedent until the date of the payment of the tax. The trustees opposed the contention, and the controversy was determined by the trial court against the contention of the state. From the order of the court entered to that effect, the state prosecutes the present appeal.

The controversy hinges on the meaning of § 9192 of the code (Rem.), as amended by §3, ch. 146, p. 595, of the Laws of 1917. The section as amended, in so far as it is material, reads as follows:

"All taxes imposed by this act shall take effect and accrue upon the death of the decedent or donor. If such tax is not paid within fifteen months from the accruing thereof, interest shall be charged and collected at the rate of eight per centum per annum unless by reason of necessary litigation such tax cannot be determined and paid as herein provided, in which case interest at the rate of eight per centum per annum shall be charged upon such tax from and after the time the cause of such delay is removed. . . ." [Rem. Comp. Stat., § 11210.]

In determining whether the estate was liable to the tax, its payment was delayed for a longer period than fifteen months, and the sole question is whether the litigation causing the delay was the litigation contemplated by the statute; that is to say, whether it was necessary litigation by reason of which the tax could not be determined and paid. The state argues that the

litigation contemplated by the statute is litigation which in some manner affects the amount of the tax to be paid and prevents its computation—such, for example, as litigation over property claimed both by the estate and by some other party, litigation over the right of inheritance, litigation over claims against and claims in favor of the estate which cannot be otherwise determined—but that it does not relate to litigation over the question whether the estate is or is not liable for the payment of a tax. But we cannot accept this view. While the statute is somewhat indefinite, certainly, litigation brought to determine whether a tax is or is not due from the estate as much prevents the computation and payment of the tax as does litigation brought to determine the amount due from the estate, and to so construe it is not to depart from its literal wording. Nor do we think the construction put upon the statute by the state correctly reflects the intent and purpose of the legislature. To so construe it is to give it a penal effect; it is to say that the legislature intended to impose a greater payment on the estate when the litigation concerning the amount of the tax was of one sort than it imposes when it is of another. Penalties for the nonpayment of taxes when due are, of course, common and usual and are necessary to the protection of the state. But this is not a penalty of that sort, if the state's contention be correct. It is a penalty imposed for asserting a claimed right in the courts. It is needless to say that such penalties are not favored, even if they can be said to be in accord with public policy.

Litigation which will excuse the payment of interest on the tax must, of course, under the terms of the statute, be necessary litigation. But all unsuccessful litigation disputing the right of the state to collect the tax

cannot be unnecessary. The statute creating the tax exempts certain bequests to charitable uses from its operation, and instances must arise where there is room for an honest difference of opinion whether the particular instance is within or without the exemption. A trustee of a trust is charged with the duty of administering the trust honestly and in accordance with law. He cannot with impunity pay unlawful claims against the trust property any more than he can with impunity fail to assert its lawful claims. Indeed, dereliction in this regard might in many instances be held to be neglect of duty so gross as to charge the trustee with a personal liability. The trustee must, therefore, not only for the protection of the trust estate, but for his own protection, litigate many claims in which he may not be successful. When, therefore, he acts in good faith, and there is reasonable ground for his act, he should not be charged with instigating unnecessary litigation. The rule is applicable here. Not only was there a doubt of liability, but it was of such a nature as to induce the learned trial judge to hold there was no liability.

The order is affirmed.

PARKER, C. J., TOLMAN, MITCHELL, HOVEY, HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

[No. 16817. Department Two. April 7, 1922.]

D. WATSON SYMONS, *Appellant*, v. SAM'L HUTCHINSON, *Respondent*.[1]

JUDGMENT (200)—RES JUDICATA—PARTIES CONCLUDED—PRIVITY. A proceeding by a judgment creditor in aid of execution wherein it was determined that certain property of the judgment debtor was subject to the execution and should be sold by the sheriff, is res judicata and a bar to a subsequent suit by the judgment debtor to enjoin the sheriff from making the sale; and objection that the parties are different is unavailing, since the sheriff is in privity with the judgment creditor, and res judicata applies to those in privity with the parties.

SAME (222)—MATTERS CONCLUDED—ACTUALLY LITIGATED. In a proceeding in aid of execution, although the question that the judgment was dormant was not raised by a formal pleading, a judgment, unappealed from, is res judicata of the question where it was raised orally, considered and actually decided.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 18, 1921, in favor of the defendant upon agreed facts, dismissing an action for an injunction, after a trial to the court. Affirmed.

Henry H. Wende, for appellant.

Grady, Shumate & Velikanje, for respondent.

HOLCOMB, J.—D. B. McBride & Company, a corporation, recovered judgment in the superior court of Washington for Yakima county, on November 26, 1913, against D. Watson Symons and others. On November 9, 1918, an execution was issued on the judgment and a levy made upon real estate in possession of the judgment debtors under a forfeitable contract of purchase from one Margaret Abrams. At the time there was an unpaid balance upon the purchase price in excess of

[1]Reported in 205 Pac. 1057.

$3,000, which was due and the vendor was demanding payment. Symons induced one Helmich to pay the balance due the vendor, and Helmich took a conveyance to himself and wife from the vendor, and then entered into a written contract with Symons and wife, and another Symons and wife whereby they agreed to purchase the land from Helmich and wife.

After the levy under the execution was made, and on December 5, 1918, McBride & Company brought an action in the same court in aid of execution. Appellant and other judgment debtors, and Helmich and wife, were made defendants, and prayed that all of the defendants set forth their interests in the land levied upon. Issue was joined in this action and it came on for trial on April 14, 1920. The parties stipulated as to the facts, one of the stipulations being that the defendants Helmich and wife held the legal title to the property in trust for the Symons. Appellant raised the point that further action on the judgment and execution issued thereon was barred by the statute of limitations, in that more than six years had elapsed since the entry of the judgment procured by McBride & Company, but the trial court took the view that, inasmuch as the execution had issued prior to the expiration of the six years, a sale could be had thereunder, and therefore overruled the objection and entered a decree in favor of McBride & Company and against appellant, and other judgment debtors, that the real estate levied upon on November 9, 1918, by the sheriff of Yakima county, or so much thereof as may be sufficient to satisfy the judgment, be sold at public auction by the sheriff, subject to the claims of the defendant Helmich in the sum of $3,000 and interest. No appeal was taken by the appellant from the judgment and decree of the court in that action, nor was any other ac-

tion of any kind taken until October 4, 1920, when appellant brought action against respondent as sheriff to enjoin him from selling the land, the basis thereof being that, since the judgment upon which the execution was issued was entered November 16, 1913, more than six years had expired, and that consequently under Rem. Code, § 459 (P. C. § 8163), the lien of the judgment had ceased to exist, and the proposed sale by the sheriff of the land involved was unlawful. A temporary restraining order was issued enjoining respondent from selling the land until the further order of the court. Issue was joined in the action, and upon the trial the court took the position that the question raised in this action was precisely the same question as the one litigated in the previous action and was *res judicata,* entered judgment dismissing the action and dissolving the temporary restraining order. Respondent thereafter proceeded to, and did, sell the interests of appellant in the land referred to, pursuant to the execution, on April 23, 1921, which sale was confirmed May 10, 1921.

Appellant contends that the court erred in holding that the matters litigated in this case had been litigated in the previous case in the proceeding in aid of execution and were *res judicata;* and erred in dismissing the action and refusing to properly enjoin respondent from selling the interests of appellant in the land described in the complaint.

It is admitted by appellant that it was suggested in the former action that the sale of the property could not be had because the judgment had become dormant, as more than six years had, or would have, expired at the time of the sale. But it is argued that, since the former action was brought well within the six-year period of the lien of the judgment, no plea of the stat-

ute of limitations could have been successfully made, either by answer or otherwise, and that the decision of the court in that proceeding was correct, as that action was not barred at the time it was brought.

Appellant also argues that, while conceding for the sake of argument, but not admitting, that the question of the statute of limitations was before the court in the former proceeding, yet the decision of the trial court in that proceeding was erroneous, as suggested by the court in this last action; still it was not *res judicata* as far as this case is concerned, as the two cases in which the question arose do not comprise the four requisites necessary to make a matter *res judicata*. The general rule laid down in 34 Cyc. 1666 is quoted as follows:

"In order to make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made."

And *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402, is quoted, where we said:

"The plea of *res judicata* is not available as a defense where the parties to the action are not the same as in the one in which the judgment sought to be set up was rendered."

See, also, *Weatherwax Lumber Co. v. Ray*, 38 Wash. 545, 80 Pac. 775, where we said:

"A judgment in a former action is not *res adjudicata* when the parties and issues were not the same;"

Putting to one side the question of whether the execution having issued prior to the expiration of the six-year period, the court had the right to proceed to a determination of the interests of the judgment debtors in the land levied upon and order the sale thereof, and the further question that the statute of limitations was

not available in the former action because not pleaded, we proceed immediately to discuss the question of *res judicata*.

The principle of *res judicata* applies not only to the parties to the action, but to those in privity with them. The basic principle upon which the doctrine of *res judicata* rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity given for such trial, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate. 15 R. C. L., p. 953, § 430.

In the former proceeding in aid of execution, the judgment creditor was a party. His action resulted in disclosing that the judgment debtor, who is the appellant here, owned certain property which was ordered sold through the instrumentality of the sheriff of Yakima county, who is respondent here. We think it must be held that there was such a privity in law between the judgment debtor and the sheriff holding his property by law that the rights acquired by the judgment creditor against the judgment debtor by virtue of the judgment in the first action inured to the benefit of the sheriff in carrying out the mandate of the court, so that there is not only an identity of persons, but an identity of the quality of the persons for or against whom the claim was made.

It is true appellant did not, in the former proceeding, by his formal written pleading, raise the question that the judgment was dormant, but he did suggest the question that the judgment was dormant at least orally, and the matter was considered by the court and decided against him. From that adverse decision, no

appeal was taken by appellant, and that judgment became final and conclusive. It was a final and appealable judgment or order adjudicating a substantial right. It is pointed out in 15 R. C. L., p. 969, § 446, that a defendant is required to set up all of his defenses, and if he neglects to do so he is concluded by the judgment rendered, and it operates as *res judicata,* not only in regard to the existence of plaintiff's cause of action, but as to the non-existence of any defense which was not pleaded. We have decided to the same effect in *Olson v. Title Trust Co.,* 58 Wash. 599, 109 Pac. 49, and *Thompson v. Washington National Bank,* 68 Wash. 42, 122 Pac. 606, 39 L. R. A. (N. S.) 972.

In the former proceeding it was pointed out to the trial court, at some time before judgment, that, although the statute of limitations had not expired on the judgment in question at the time of the answer of appellant, it would expire prior to the sale under the execution. The trial court took cognizance of the suggestion as if it were a formal plea. Evidently it was thought that this would constitute a bar to the proceeding, and for that reason was raised in the former proceeding. Whether the court decided correctly or not cannot now concern us, because it is a question that was raised between parties who are necessarily in legal privity, and was so adjudicated.

We conclude, therefore, that the judgment of the trial court was correct and must be affirmed.

Judgment affirmed.

PARKER, C. J., MAIN, HOVEY, and MACKINTOSH, JJ., concur.

[No. 16657. Department One. April 8, 1922.]

ARTHUR HARPER *et al., Appellants,* v. W. N. HOLSTON *et al., Respondents.*[1]

PUBLIC LANDS (9)—WATERS AND WATER COURSES (45)—SURVEY—MEANDER LINES—RIGHT TO BED OF STREAM. Government meander lines of a stream, marking fractional portions of the public domain, are run to ascertain the quantity of land in the fractions and not as boundary lines, and the patentee takes to the thread of an unnavigable stream.

WATERS AND WATER COURSES (46)—BED AND BANKS OF STREAM—ACCRETION. Where a meandered stream, constituting the boundary of government fractional subdivisions, gradually shifts its location, a subsequent patent of the fractional lot conveys title to any accretions.

SAME (46). The shifting of a government meandered stream is shown to have been gradual, so that the gains were made by accretion, and not by avulsion, where all the witnesses testified that there were no sudden changes and there is no evidence of abandoned channels characteristic of avulsions.

EJECTMENT (6)—TITLE TO SUPPORT ACTION. In ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered January 10, 1921, in favor of the defendants, in an action in ejectment, tried to the court. Reversed.

Grady & Shumate, for appellants.

H. J. Snively, for respondents.

FULLERTON, J.—This is an action of ejectment, brought by the appellants Harper against the respondents, Holston and Woodall, to recover possession of a tract of land described as parts of lots two and three, in section twenty-eight, in township eleven, north of range twenty, east of the Willamette Meridian. The

[1]Reported in 205 Pac. 1062.

complaint was in the usual form in such cases. The answer put in issue the allegations of the complaint, and, as an affirmative defense, alleged that the land claimed by the appellants was without the boundary lines of the lots named, and was unsurveyed, unappropriated, and unpatented land belonging to the government of the United States. Further matters were alleged tending to show that the respondents' occupancy of the land was lawful and of right. The trial was had by the court sitting without a jury, and resulted in a judgment in favor of the respondents. To review the judgment, this appeal is prosecuted.

The facts giving rise to the controversy are in substance these: The Yakima river flows through the township of which the land in controversy forms a part, in a general southeasterly direction. This is an unnavigable stream, although it flows a considerable body of water. In extending the interior surveys over the township named, the government treated the river as it usually treats a navigable stream; it caused the parts of the township into which the river divided it to be separately surveyed, projecting the section lines which intersected the stream in the northerly part from north to south and from east to west, and those which intersected it in the southerly part from south to north and from west to east, causing the stream to be meandered on both of its banks. The northerly part of the township was surveyed in 1865, and the southerly part in 1874. The measurements reported by the surveyors show a considerable shifting of the channel of the river between the time of these surveys. Measuring south from the northeast corner of section twenty-eight, the section in which the lands in controversy are situated, the surveyor surveying the northerly part reported that he intersected the north bank of the river at

twenty-three and twenty-seven one hundredths chains, while the surveyor measuring north from the southeast corner of the same section, reported that he intersected the south bank of the river at thirty-seven and fifty one-hundredths chains, which, ignoring the width of the river and assuming that the section was of the usual size, would indicate a shifting of the channel of the river to the south at this point, between the time of the surveys, some twenty chains. The meander lines also indicate such a shifting. Projecting the courses and distances westerly, they gradually approach each other, reaching the approximate width of the river as the west boundary line of the section is reached. Projecting them easterly, the approach of the lines is more rapid, practically coinciding at a point some one-fourth of a mile east of the east line of section twenty-eight. From this point they again diverge, the first of the surveys extending in a general easterly direction, while the second extends to the south and southeast. The evidence also shows that there has been, since the last survey, a further shifting of the main channel of the river to the south. A recent survey made by an engineer who testified at the trial shows that the meander corner set as the south boundary of the river by the surveyor who surveyed the south part of the township was set to the north of the present main channel, and that his meander line, for considerable distances both east and west of the meander corner, is also to the north of the present channel; at one point more than twenty chains to the north.

The recent survey also shows other changes in the channel of the river. Neither of the surveyors making the original surveys reported finding more than one channel, while the recent survey shows three, although two of these practically coincide at the place where

the east line of section twenty-eight crosses the main or southernmost channel. Evidence that the two northerly channels had no existence at the time of the original surveys is also furnished by the field notes of the surveyors making the surveys. The surveyor surveying the north part of the township, in projecting his meander lines, twice crossed places where the north channel now exists, and crossed one place where the center channel now exists, without mention of either, and the surveyor surveying the south part of the township twice crossed places where the middle channel is now found, likewise without noting it in his field notes. That the failure to mention the streams, if they then existed, could have been no mere inadvertence is evidenced by the fact that the field notes of each of the surveyors are replete with references to much less minor objects, some of which are water courses. It may be stated here that there is nothing in the record which challenges the good faith of the surveyors making the surveys, and nothing which indicates that they did not truthfully report the conditions as they found them. There is not much on the surface of the ground, it is true, which indicates that the river was at the places the surveyors found it to be at the times of their respective surveys, although the engineer making the recent survey did say that there was a decided bank at the place where the first surveyor set his meander corner, which bank followed for some distance on each side of the corner the meander line as the engineer retraced it. But assuming there were no indications of a channel, it by no means convicts the surveyors of false or fraudulent surveys. The land through which the river courses at this place is bottom land, composed of soil, sand and gravel, substances not conducive to the maintenance of a fixed channel. Indeed, it seems

to us, it would be more strange if the river there maintained a uniform channel than it is strange that it would shift one way or the other as time elapsed. The evidence of all of the witnesses testifying at the trial is to the effect that there has been a gradual shifting of the main channel of the river to the southward. While none could remember when there was not more than one channel at this place, all agree that the south channel is now, and has always been, the main channel.

The land described in the complaint was entered with other lands as a homestead in 1899. The government patented the land to the entryman in 1891, and the appellants are his successors in interest. The entry and the patent, of course, described the land according to the survey of 1865.

If we have made ourselves understood by the foregoing statement, it is apparent that the surveys made of the different parts of the township do not connect. Stated more particularly, there is between the meander lines of the two surveys an irregular shaped tract of land something more than the width of the river over which the surveys do not extend. It is in this area that the tract in dispute lies. The respondent contends that, because the government surveys do not close over it, it is unsurveyed public land, subject to settlement in its present condition, and subject to entry when the government chooses to extend the surveys over it; while the appellants contend that it is an accretion to the tract patented to their predecessor in title, and is theirs in virtue of their title deeds.

There is no disagreement between counsel as to the applicable principles of law. Meander lines run in surveying fractional portions of the public lands bordering upon streams, whether navigable or unnavigable, are run not as boundaries of the tract, but are run

for the purpose of defining the sinuosities of the banks of the streams, and as a means of ascertaining the quantity of land in the fractions; that the stream itself is the actual boundary in all cases; the part of the stream which forms the boundary differing in the different states according to the local law; that the local law of this state recognizes the line of ordinary high water as the boundary line on all navigable streams, and the thread of the stream as the boundary on all streams that are unnavigable.

Another rule is that, when grants of land border on running water, and the course of the stream is changed by that process known as accretion—that is to say, the gradual washing away on the one side and the gradual building up on the other—the owner's boundary changes with the changing course of the stream. As was said by the supreme court of the United States in *New Orleans v. United States,* 10 Peters (35 U.S.) 662:

"No other rule can be applied, on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gains."

The rule is as much applicable to the government as it is to private individuals. If the government chooses to grant its lands, making a running stream one of the boundaries of the grant, it must expect this part of the boundary to change as time goes on. Ordinarily it gains in one place what it loses in another, and on no principle of justice can it say that it is not to be subjected to the general rule. And such we understand to be the holding of the supreme court in *Jefferis v. East Omaha Land Co.,* 134 U. S. 178. There the boundary was the Missouri river. The patent to the land made to the individual by the government was made some years after the survey, during which time

there had been an accretion to the land by the changing course of the stream. It was held that a patent to the land according to the lot number of the official plat of the survey conveyed to the patentee the title to all accretion which had been formed between the time of the survey and the date of the patent.

On the other hand, it is equally the rule that, when a stream which is a boundary, from any cause, suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank, the boundary does not change with changed course of the stream, but remains as it was before. This sudden and rapid change is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time.

It is the rule, also, that the appellants must recover on the strength of their own title, and not on the weakness of their adversary's. And, since the land in controversy is not within the defined boundaries of the conveyances under which they hold, it must appear, if they are to recover, that the disputed land has been added to their original boundaries by accretion. Does the evidence preponderate in favor of this view? It is our conclusion that it does. Some of the salient facts we have hereinbefore set out. In addition, it appears that the river has not, within the memory of the witnesses testifying on the subject, ever been subject to sudden or violent changes. All testify that there has been a drift of the main channel of the river to the south, and all agree that the change has been gradual, not the result of any sudden change. There is, of course, a period between the time of the original surveys and the time when the recollection of the witnesses

begin which is not covered by the evidence, and it is evident, also, that during this period the river formed two additional channels at this place. But we cannot think this argues against the general conclusion that the drift of the main channel has been gradual rather than sudden or avulsive. The record is silent as to evidences of abandoned channels, and these it would seem must certainly exist if the change in the course of the stream had been other than gradual.

It is our conclusion that the land in dispute is a part of the appellant's holding, rather than a part of the unsurveyed public lands of the United States. The judgment is therefore reversed, and the cause remanded with directions to enter a judgment for the appellants, plaintiffs below.

PARKER, C. J., BRIDGES, MITCHELL, and TOLMAN, JJ., concur.

[No. 16813. Department One. April 8, 1922.]

FRED HENSLIN *et al., Respondents,* v. J. CARLTON PRATT *et al., Appellants.*[1]

NEW TRIAL (49)—MISCONDUCT OF JURORS—IMPEACHMENT—MATTERS INHERING IN VERDICT. The verdict of a jury cannot be impeached on motion for a new trial by affidavits of the jurors showing that they disagreed and were mistaken as to the testimony given by a certain witness in the case; since the fact inhered in the verdict.

MUNICIPAL CORPORATIONS (379, 390)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the defendant and the contributory negligence of plaintiff in a collision of automobiles at a street intersection, are for the jury, where it appears that plaintiff's stage had the right of way as the car first entering the intersection, and defendant's car was traveling at excessive speed, while the stage driver was going slower, and looked to the left before entering the intersection.

[1]Reported in 205 Pac. 867.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 14, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to an automobile sustained in a collision. Affirmed.

Remann & Gordon, for appellants.
Ralph Woods, for respondents.

Bridges, J.—This was a suit to recover on account of damages to an auto stage. Judgment was entered on the verdict for the plaintiffs, and the defendants have appealed.

The respondents were the owners of the stage, and the appellants were the owners of an automobile which was in the collision. The respondent Fred Henslin was driving the stage, and the appellant J. Carlton Pratt was driving the automobile. The collision occurred within the intersection of A street and Puyallup avenue, in the city of Tacoma. The automobile was going north on A street and the stage was going west on Puyallup avenue. The night of the accident was dark and rainy and the pavement was slippery. When the driver of the stage saw that a collision was imminent, he turned his car considerably to the right, and at the same time the driver of the automobile pulled his car over towards the left, so that the collision occurred at the northwest corner of the intersection. A man by the name of Harper was riding in the front seat of the automobile, and was called as a witness for the appellants. Among other things, he testified that, if the driver of the stage had veered to the left instead of to the right, the collision would have been avoided. In support of their motion for a new trial, the appellants presented the affidavits of two of the jurors to the effect that they did not hear Harper's

testimony in this respect. They also presented the affidavit of another juror to the effect that he understood that Harper had testified that, if the driver of the stage had veered to the left, the accident would have been avoided. All three of these jurors further stated that other members of the jury contended that Harper had testified that, if the driver of the automobile had turned more sharply to the left, the accident would not have happened, and that ultimately ten of the jury were thus persuaded to believe that Harper so testified, and that the verdict was rendered on the belief and assumption that Harper had so testified. The trial court refused to consider these affidavits, and denied the motion for new trial, and the appellants now claim that the court erred in this respect.

Practically all the courts hold that, if the facts or things described in the affidavits of jurors in support of the motion for a new trial inhere in the verdict, they will not be considered. The rule is plain, but the application of it to individual cases is more difficult.

In the case of *State v. Parker,* 25 Wash. 405, 65 Pac. 776, one of the jurors made an affidavit in support of a motion for new trial to the effect that another juror had announced in consultation that he knew the defendant well, and that he had been implicated in certain other criminal matters, and belonged to a gang of criminals. Held, that the affidavit should be considered, and that the alleged facts therein stated did not inhere in the verdict.

In the case of *Marvin v. Yates,* 26 Wash. 50, 66 Pac. 131, the court held that an affidavit of a juror which stated that the jury reached its verdict by a certain method of calculation would not be considered in support of a motion for a new trial, because the alleged misconduct inhered in the verdict, and the jurors could not be heard to impeach their verdict.

In *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28, it was held that, on a motion for new trial, the verdict of the jury cannot be impeached by affidavits of jurors showing that they arrived at their verdict by consideration of matters not in issue and withdrawn from them by the court.

In *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B 153, an affidavit of one of the jurors, made in support of a motion for a new trial, to the effect that another juror had claimed, during the deliberations, that he knew a certain place was a house of prostitution, should be considered by the court because it does not inhere in the verdict, the court saying that jurors cannot make themselves impeaching witnesses on questions of fact.

In the case of *Maryland Casualty Co. v. Seattle Electric Co.*, 75 Wash. 430, 134 Pac. 1097, it appeared that one of the jurors, without the consent of the court, had, during the trial, visited the place of accident, and during the deliberations of the jury gave them the advantage of the knowledge she had thus obtained. The court granted a new trial on this account.

In the case of *State v. Gay*, 82 Wash. 423, 144 Pac. 711, it was held that a new trial for misconduct of the jury would not be granted upon the affidavit of a juror that he and others did not believe in the guilt of the accused, but consented to a verdict of guilty under the belief that the court, upon the recommendation of the jury, would give the accused a short jail sentence. The court held that the facts recited in the affidavit inhered in the verdict, and said:

"But few verdicts are reached in which some juryman does not yield in some degree his opinions and convictions to the opinions and convictions of others. And when he does so, even in criminal cases, it is to

the interest of the public that he be not permitted thereafter to gainsay his act."

In the case of *Lindquist v. Pacific Coast Coal Co.*, 86 Wash. 408, 150 Pac. 619, some of the jurors who did not concur in the verdict made affidavits in support of a motion for a new trial in which they stated that, during the consideration of the case, one of them advised the jury of certain facts concerning the parties to the action, which facts had not appeared in the testimony. Held, that the trial court properly denied a new trial because the facts inhered in the verdict.

In the case of *Wagoner v. Warn*, 88 Wash. 688, 153 Pac. 1072, it was held that an affidavit made by one of the jurors to the effect that a verdict was forced by other jurors holding out and refusing to concur recited facts inhering in the verdict and could not be considered.

In the case of *State v. Lyle*, 105 Wash. 435, 178 Pac. 468, a defendant, who was a druggist, was charged with an unlawful sale of intoxicating liquor, and one page of the register which he kept showing such sale was admitted in evidence, but the whole register was sent to the jury. There was an affidavit of some of the jurors in support of a motion for a new trial, to the effect that, in deliberating on their verdict, they read many pages of the register, and found many other sales by defendant, and that such influenced their verdict. It was held these affidavits could not be considered because they impeached the jury's verdict.

We have not undertaken to review all of our decisions on this question; the foregoing will show the general trend. It is our view that the trial court was right in refusing to consider the affidavits of the jurors in this case, for the reason that the facts recited in

them clearly inhere in the verdict. They do nothing more than show how the jury arrived at its verdict. It is not only the privilege, but the duty of the jury, when deliberating on its verdict, to review the evidence. It is common for jurors to disagree as to what the evidence shows in certain particulars. If affidavits such as are in this case will support a motion for new trial, then it seems manifest that relatively few verdicts would stand. This case does not come within the rule of those cases which hold that a new trial will be granted when it is shown that some of the jurors had brought before the jury alleged facts which were entirely extraneous from the evidence. What occurred here amounted to nothing more than certain jurors disputing as to what the testimony was. It may be true, as counsel for appellants assert, that the mistake of the jury in this particular instance was damaging to the appellants, but society and the business world are largely controlled by certain fixed rules of law, and it will not do to overturn such rules simply because isolated instances of injustice may result from their application.

The appellants further argue that their motion for judgment notwithstanding the verdict should have been granted because the evidence not only failed to show any negligence on their part, but, on the contrary, did show such negligence on the part of the driver of the stage as materially contributed to the damages sued for. There is an ordinance in the city of Tacoma which provides that the vehicle first within the intersection of streets has the right of way. There was some testimony on behalf of the plaintiffs that the stage came into the intersection in question ahead of appellants' car. If such were the fact, it was ordinarily the duty of the appellants to give the stage the

right of way. It is quite true that the respondents' testimony in this regard was contradictory, yet there was sufficient to require the case to be submitted to the jury. The testimony with reference to the speed of the appellants' car was meagre, yet there was some evidence tending to show that it was being driven at an unlawful speed when and after it entered the street intersection.

We are also satisfied from the reading of the testimony that the court properly submitted to the jury the question of negligence on the part of the driver of the stage. There was testimony from which the jury could have found that the stage was being driven much slower than the automobile; that it entered the intersection ahead of the automobile; that the automobile could have avoided the accident by turning west on Puyallup avenue instead of continuing north on A street, and that, when the stage entered the intersection, its driver looked to his left to see if there was any car coming from the south on A street. Such being the situation, the court was bound to submit the case to the jury.

Judgment affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16881. Department One. April 8, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN R. CROWDER, *Appellant*.[1]

RAPE (21) — EVIDENCE — ADMISSIBILITY — PERSONAL RELATIONS — OTHER ACTS. In a prosecution for statutory rape upon a child under the age of consent, evidence of the details of other acts of sexual intercourse is admissible in corroboration of the prosecutrix, where the time covered was but two months, during which their relations were continuous.

WITNESSES (84, 94)—CROSS-EXAMINATION—ACCUSED AS WITNESS—CONSTITUTIONAL PRIVILEGE. While accused, by taking the stand, submits himself to proper cross-examination upon a pertinent subject, yet, under Const., art. 1, § 9, providing that no person shall be compelled to give evidence against himself, such cross-examination (aside from impeachment) must be based only upon subjects opened up by his examination in chief.

SAME (84, 94). In a prosecution for statutory rape, on a day certain, in which the accused took the stand and testified to forming an acquaintance with the prosecutrix, but that the same had terminated prior to the day in question, it is a violation of his constitutional right against self incrimination to compel him, on cross-examination, to testify to acts of intercourse with the prosecuting witness on three or four occasions, one being the act relied on by the state.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered April 26, 1921, upon a trial and conviction of rape. Reversed.

George A. Joiner and *R. V. Welts*, for appellant.

W. L. Brickey and *W. H. Hodge*, for respondent.

TOLMAN, J.—This is an appeal from a judgment entered upon a verdict of guilty of the crime of carnally knowing a female child under the age of eighteen years.

[1]Reported in 205 Pac. 850.

While a number of assignments of error are made, those chiefly argued and relied upon may be grouped under two heads, and we will confine ourselves to the two questions thus presented.

It is conceded that, in cases of this character, the prosecuting witness may testify to acts of intercourse other than, and prior in time of occurrence to, the one upon which the defendant is being tried, as showing the relations of the parties, and tending to corroborate other evidence going directly to the offense charged. But it is contended that the details of such prior acts are inadmissible, and more especially that subsequent acts and the details thereof are wholly inadmissible for any purpose. As to the inadmissibility of the details, appellant cites and relies upon *State v. Sigler*, 116 Wash. 581, 200 Pac. 323, and *State v. McDonald*, 116 Wash. 668, 200 Pac. 326; but these cases each deal with a wholly different and independent crime, the details of which would have no bearing upon the issue being tried, and are not controlling upon the question here presented. In this case the prosecuting witness was examined in chief as to her relations with the accused from the beginning to the end of them, the time covered being less than two months, and there being no break in the relations during that period, the prosecutor announcing that he would, in due time, elect as to which particular act he would rely upon for conviction. Any one of the acts detailed by the witness would have been sufficient under the information.

"The general rule that evidence of other crimes is inadmissible does not apply to proof of other acts of sexual intercourse between the parties in statutory rape cases, that is, in prosecutions for rape on a female under the age of consent, or on a woman imbecile, even though such other acts constitute separate and distinct crimes. Provided they are not too remote

in time or otherwise, such other acts are relevant and admissible to show the lustful disposition of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged, and to corroborate the testimony of the prosecutrix as to that act. Evidence of acts prior to the one charged is quite generally held admissible, and, except in a few jurisdictions, evidence of subsequent acts is also admissible." 16 C. J. 608.

See, also, *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

We hold, therefore, that, under the conditions here shown, the evidence of the details of what later proved to be prior and subsequent acts was properly admitted.

The second question relates to the cross-examination of the accused, who presented himself as a witness in his own behalf. On direct examination he testified that he became acquainted with the prosecuting witness and called at her home quite frequently; that he ceased to call upon her about April 1920 (a time subsequent to the particular act which the state elected to rely upon), and that he had not called upon her or been out with her at any time during certain subsequent months. This, with the details of an offer and certain efforts to marry the prosecuting witness, comprise the gist of his testimony in chief, so far as it is now material. On cross-examination, over strenuous and detailed objections, he was compelled to testify that he did have intercourse with the prosecuting witness on three or four occasions, one being the act upon which the state elected to rely.

Appellant, in support of his position that such cross-examination constitutes reversible error, relies on § 9 of art. I, of our state constitution, which reads:

"No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

and upon Rem. Code, § 2148 (P. C. § 9241), which, among other things, provides:

". . . any person accused of any crime in this state, by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself, or herself, as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses."

And also, upon Rem. Code, § 2152 (P. C. § 9218), which provides:

"The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions."

As to the constitutional question, there is no doubt that, when the accused takes the witness stand in his own behalf and by his testimony in chief opens up a pertinent subject, he thereby submits himself to proper cross-examination on such subject, and may not prevent or defeat cross-examination thereon by claiming the protection of the constitutional provision. *State v. Duncan,* 7 Wash. 336, 35 Pac. 117, 38 Am. St. 888; *State v. Melvern,* 32 Wash. 7, 72 Pac. 489; *State v. Hill,* 45 Wash. 694, 89 Pac. 160; *State v. Peeples,* 71 Wash. 451, 129 Pac. 108; *State v. Morden,* 87 Wash. 465, 151 Pac. 832; and *State v. Brooks,* 89 Wash. 427, 154 Pac. 795. In most, if not all, of the cases just cited the rule is laid down expressly, or by necessary implication, that a defendant in a criminal case, who voluntarily takes the witness stand in his own behalf, is subject to all the rules relating to the cross-examination of other witnesses.

Upon the subject of the cross-examination of the accused, there seems to be at least three fairly well defined rules: first, the English or orthodox rule, to the effect that the taking of the witness stand is a

complete waiver as to all facts, including those which merely affect credibility; second, that the waiver extends only to matters relative to the issue, and does not permit cross-examination on collateral matters such as merely affect credibility; and third, the rule, usually founded on a statute, which subjects the accused to such cross-examination as may be given to other witnesses, or (leaving out the question of impeachment, not material here) permits of cross-examination based only upon subjects opened up by his examination in chief. This is generally referred to as the "American rule," and is thus defined in 28 R. C. L. § 194, p. 604:

"Until 1827, the orthodox rule seems to have been almost universally followed. But in a Pennsylvania case decided in that year it was said that a witness might not be cross examined to facts which are wholly foreign to what he had already testified. Subsequently the broad rule was laid down by the United States supreme court, that a party has no right to cross examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. This rule, commonly known as the 'American rule,' has now become firmly established in the federal courts and in the courts of most jurisdictions of this country. The reasons usually designed for its adoption are that it prevents a confusion of the cases made out by the opposing witnesses, and places the parties on an equal footing, preventing either from having an unfair advantage over the other in the matter of cross examination. Under this rule a witness may not be asked any question on cross examination which does not tend to rebut, impeach, modify, or explain any of his testimony. Of course it is error for the trial court to refuse to permit the cross examination of a witness to extend to all matters germane to

the direct examination, as such a cross examination is a matter of absolute right and is not a mere privilege. In those jurisdictions where the American rule is followed, the courts frequently say, in effect, that a party to a cause may not introduce a defense by cross examining his adversary's witness as to matters not germane to the direct examination, but if a question is within the scope of the direct examination it is not objectionable on cross examination because it tends to establish a defense to the action."

This rule has been so largely adopted and followed in this country that it seems unnecessary to cite further authorities, though it must be admitted that there are some seeming inconsistencies in its application. While this court has never passed squarely upon this question in a criminal case, yet in civil cases there remains no doubt, and from the language of the statutes quoted and the expressions contained in our cases hereinbefore cited, it cannot be doubted that we are bound to the doctrine of the modern, or American rule, and it only remains to apply it to the facts in this case.

It is argued by the state, that, when the appellant testified to an acquaintance with the prosecuting witness, and that he had called at her home quite frequently, he thereby opened up the whole subject of his relations with her. If the facts testified to in chief had directly, or by inference, tended to dispute or deny the charge, there might be force in this position; but, as we view it, the testimony referred to had no such possible effect. An acquaintance usually precedes such acts as are here charged, but such acts do not invariably, or even usually follow an acquaintance between persons of the opposite sex, and if the evidence was material at all, it tended towards corroboration of the state's evidence rather than otherwise. The

purpose of cross-examination is to break or weaken the force of the testimony given in chief; it must be used as a shield and not as a sword, and as the state had already, as a part of its own case, offered evidence to prove the identical facts testified to on direct examination by appellant, it could hardly have desired, by its cross-examination, to accomplish the legitimate result of breaking or weakening appellant's testimony in that respect. Moreover, the testimony elicited on cross-examination had no such purpose or effect, but its evident purpose, which was fully accomplished, was to cause the appellant to incriminate himself. This, in *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 933, it was held, could not be done.

The other assignments of error have been considered, but deeming them not well taken, we do not consider it necessary to discuss them.

For the reasons indicated, the judgment must be and it is reversed, and the case remanded for a new trial.

PARKER, C. J., MITCHELL, and BRIDGES, JJ., concur.

[No. 16884. Department One. April 8, 1922.]

THE STATE OF WASHINGTON, *Appellant*, v. WILL D. WALLACE, *Respondent*.

THE STATE OF WASHINGTON, *Appellant*, v. H. I. HOGGATT, *Respondent*.

THE STATE OF WASHINGTON, *Appellant*, v. I. J. COLLINS, *Respondent*.[1]

DISTRICT AND PROSECUTING ATTORNEYS (3)—SPECIAL PROSECUTORS—APPOINTMENT—STATUTORY PROVISIONS. Rem. Comp. Stat., § 4135, and Laws 1891, p. 95, § 5, both expressly authorize the court or judge to appoint a special prosecuting attorney where the prosecuting attorney is unable to perform his duties; and this, without any recital or reference as to how he will be compensated.

SAME (3). Rem. Comp. Stat., § 4135, authorizing the appointment of any qualified person in the state as special prosecuting attorney, where no qualified person in the county will consent to act, authorizes the appointment of an attorney from another county, when the order recites that, upon request, local attorneys selected by the court had refused to act.

Appeals from orders of the superior court for Whatcom county, Hardin, J., entered March 28, 1921, quashing grand jury indictments on the ground of disqualification of the special prosecuting attorney. Reversed.

Loomis Baldrey and *Frank W. Radley*, for appellant.

Peringer & Thomas, for respondent Will D. Wallace.

A. C. Durham and *Edwin Gruber*, for respondent H. I. Hoggatt.

Will J. Griswold and *C. E. Abrams*, for respondent I. J. Collins.

TOLMAN, J.—These cases were by stipulation consolidated for the purposes of this appeal, but the Collins

[1]Reported in 206 Pac. 27.

case was dismissed before the hearing was reached here, and therefore will not be further mentioned or considered. The appeals are from orders of the trial court quashing grand jury indictments upon the ground that the special prosecutor who presented these matters to the grand jury was disqualified.

It appears that a grand jury was duly convened in Whatcom county on December 28, 1920, and inferentially it appears that the chief purpose for the convening of the grand jury was that certain rumors and charges affecting various county officers, including the prosecuting attorney, should be probed and investigated, and that because of the rumors or charges affecting him and his office, the prosecuting attorney deemed himself disqualified to present these matters fully to the grand jury. The judges of the superior court and the county commissioners, with the prosecuting attorney assenting, seem to have arrived at the conclusion that it would not be wise or appropriate for the prosecuting attorney or any of his regular deputies to take part in these proceedings. Prior to the empaneling of the grand jury, on December 28, 1920, the judges of the superior court for Whatcom county made and entered an order reciting that it was necessary to have a special prosecuting attorney appointed to appear in the place of the prosecuting attorney before the grand jury, during the investigation of the county offices and officials, and therein appointed one Gomer Thomas special prosecuting attorney for the work referred to. On the same day, the prosecuting attorney also appointed Thomas as special deputy prosecuting attorney for the purpose indicated, and Thomas took the oath of office and entered upon his duties with the grand jury.

On December 30 following, the board of county commissioners entered an order reciting that they had not

appointed, and would not sanction the appointment of, Mr. Thomas as special deputy, or to act as prosecutor before the grand jury in the matter referred to, and in the order recited that if, as a matter of law, any action that the board had theretofore taken, or any action taken by any of its members, could be, or should be, construed as a consent to or approval of such appointment, then that appointment "be and the same is hereby now revoked." Mr. Thomas continued his work until January 3, 1921, when he resigned and refused to proceed further. The *Attorney General* of the state was called upon by the prosecuting attorney to come in person or to send an assistant or deputy from his office to take up this work, but the *Attorney General* found it impossible to comply with this request, and finally suggested that Tom W. Holman, prosecuting attorney for Jefferson county, then about to retire from that office, was a fit, proper and capable person to undertake the work, but did not then or afterwards appoint him as an assistant or deputy, or in any manner clothe him with any of the authority of the *Attorney General's* office.

On January 6, 1921, the judges of the superior court for Whatcom county entered an order in which it was recited that Thomas had resigned; had refused to further proceed with the work, though the court had requested him so to do; that the court had selected other local attorneys, who had refused to act; and "Tom W. Holman, prosecuting attorney of Jefferson county, residing at Port Townsend, Washington, being a fit and proper person to take charge of the grand jury, and he having indicated his willingness to accept the compensation offered by the commissioners of Whatcom county, Washington, it is therefore ordered that the said Tom W. Holman be and hereby is ap-

pointed as special prosecuting attorney to take charge of the grand jury now sitting, so far as the same has to do with the investigation of matters concerning and relating to any county officers in Whatcom county, Washington, or matters having any connection with any officers in Whatcom county, Washington," etc. On the same day, the board of county commissioners made an order appointing Mr. Holman as special prosecutor for the work indicated, fixing his compensation, and reciting therein the necessity for such appointment, and that the *Attorney General* had designated Mr. Holman as a fit, proper and capable person. On the day following, the prosecuting attorney appointed Mr. Holman as special deputy prosecuting attorney for the grand jury work, and thereupon Mr. Holman took and filed an oath of office as special prosecuting attorney, entered upon his work and carried it through to completion. In the meantime, on January 9, 1921, the prosecuting attorney completed his first term of office, and having been theretofore re-elected, entered upon his second term. On the same day, the terms of two members of the board of county commissioners expired, and they were succeeded by their duly elected successors. Immediately following their qualification, the prosecuting attorney again appointed Mr. Holman as special prosecutor, and the new board of county commissioners did likewise, and Holman again took and filed a proper oath of office. On February 24, 1921, the grand jury returned the indictments which are now in question, and thereafter, on presentation of a proper motion, the trial court entered an order quashing these indictments, from which order this appeal is prosecuted.

The trial court appears to have based its orders upon the supposed disqualification of Mr. Holman to

appear as special prosecutor before the grand jury, interrogate witnesses, present the evidence, and sign the indictments, it not being contended, and there being nothing in the record to indicate, that Mr. Holman was present with the jury during any of its deliberations, or while the jury was voting upon the question of finding these indictments, or either of them. The sole question now presented, therefore, is as to the qualification of Mr. Holman to so appear as special prosecutor before the grand jury.

It is not entirely clear from the record whether the orders appealed from were based upon the idea that the prosecuting attorney was not disqualified, but was ready, willing and able to himself proceed with the work, or upon the conceded fact that Mr. Holman was not a resident or an elector of Whatcom county at the time. A careful reading of the record, however, convinces us that the prosecuting attorney made clear to the trial court his position, which was, in effect, that he was disqualified as to the investigation of the charges affecting his own office, and that the charges affecting other county officers were, or might be, so interrelated as to make it improper or embarrassing for him to act thereon; and that he was ready to proceed with relation to all other matters which might come before the grand jury, but refused and declined to so proceed with reference to the investigation of any of the county officials. With the record in this state, we conclude that the orders quashing the indictments were in fact based wholly upon the supposed disqualification of Mr. Holman arising from his having been a resident and elector of another county at the time of his appointment, and during the time of his service. Hence the case of *State v. Heaton,* 21 Wash. 59, 56 Pac. 843, discussed in the briefs, is not in point.

Our statutory law upon the subject of the appointment of special prosecutors is somewhat involved and confusing. The first enactment upon the subject appears to have been that of 1858 (Laws of 1857-8, p. 13, § 6), which reads:

"When the prosecuting attorney fails, from sickness or any other cause, to attend at a term of the district court, or a criminal session of the probate court, where he has (been) duly notified of business to be transacted, or to perform his duties at such term, the court may appoint some qualified person to discharge the duties of prosecuting attorney, who shall receive the fees of the office accruing for services rendered under such appointment."

This act was amended in respect to the fees to be paid, or re-enacted with slight changes in the wording, without in any manner changing or limiting the power of the court to appoint, a number of times at subsequent sessions of the legislature, and was put in its present form as it appears in Rem. Code, § 3966 (P. C. § 1794), by the amendatory act of 1893 (Laws of 1893, p. 82, § 1), which reads:

"When any prosecuting attorney fails, from sickness or other causes, to attend a session of the superior court of the county for which he was elected or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the person so appointed shall receive a compensation to be fixed by the court, to be deducted out of the stated salary of such prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of such prosecuting attorney: *Provided,* That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court of that county shall appoint some suitable person, a duly admitted and practicing attorney

at law and resident of the state of Washington, to perform the duties of prosecuting attorney for such county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, the same to be paid by the county for which such services are performed." [Rem. Comp. Stat., § 4135.]

In addition to all of this, the legislature, in 1891, passed a general act entitled "An Act in relation to attorneys," § 5 of which reads:

"When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until such disability is removed." Laws of 1891, Ch. LV, § 5, p. 95.

which does not appear to have since been amended or repealed. We see no reason, under the familiar and well-settled rules, which we have long followed, why either of these acts should be held to have repealed the other by implication, and therefore must hold that both are still in full force and effect.

Without going further or discussing the authorities cited from other jurisdictions, we are of the opinion that there is ample authority vested in the superior court to appoint a special prosecutor in all proper cases, and that the exercise of that authority is not conditioned upon any recital in the order as to how, or from what source, he shall be compensated. Further, the act of 1893 expressly authorizes the appointment of any qualified attorney resident of the state in cases where there is no qualified person resident of the county who will consent to act, and such condition fairly appears from the recitals in the order appointing Mr. Holman; but even if these recitals were held to be insufficient, the superior court will be presumed

to have acted within its authority until the contrary is made to appear. Here there is no suggestion in the record that at the time in question there was any qualified person resident of Whatcom county who was willing or consented to perform the duties of the prosecutor.

The judgments appealed from are reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16928. Department One. April 8, 1922.]

JOHN NIPGES, *Appellant*, v. EDITH M. THORNTON, *Respondent*.[1]

TAXATION (5)—CONSTITUTIONAL RESTRICTIONS—LEVIES ON COUNTIES—POLL TAX. Rem. Comp. Stat., § 11246, levying a poll tax, one-fifth of which is retained by the counties collecting the same and goes to their current expense funds, does not offend against Const., art. 11, § 12, providing that the legislature shall have no power to impose taxes upon counties, cities, etc.; since the one-fifth part in question is a proper allowance for reimbursing the counties for the expense of collecting the tax.

CONSTITUTIONAL LAW (3)—GENERAL RULES OF CONSTRUCTION. A statute will not be held void unless there can be no reasonable doubt that it offends against the constitution.

STATUTES (9)—PARTIAL INVALIDITY. Under Rem. Comp. Stat., § 11251, providing that the invalidity of any part of the poll tax law shall not invalidate the balance of the act, a taxpayer cannot complain of the illegality of allowing the counties to retain one-fifth of the tax, since otherwise it would all go to the state.

TAXATION (5)—CONSTITUTIONAL RESTRICTIONS—STATEMENT OF OBJECT—POLL TAXES. The poll tax law, Rem. Comp. Stat., §§ 11242 to 11246, does not offend against Const., art. 7, § 5, providing that every law imposing a tax shall state distinctly the object of the same, by reason of the proviso to § 11246 making it the duty of the legisla-

[1]Reported in 206 Pac. 17.

ture to make further appropriations, if the sums collected for poll taxes shall be insufficient to pay the principal and interest on the soldiers' bonus bonds; since all the moneys collected are deposited in the state general fund to be used freely without reference to future contingencies.

SAME (6)—CONSTITUTIONAL RESTRICTIONS. The poll tax law, Rem. Comp Stat., §§ 11242-11251, does not offend against Const., art. 7, §§ 1 and 2, requiring all property to be taxed according to its value at a uniform and equal rate; since there is no prohibition against poll or capitation taxes, and sources of revenue other than property taxes are recognized.

Appeal from a judgment of the superior court for Whatcom county, Brown, J., entered June 13, 1921, in favor of the defendant, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

Bixby & Nightingale, for appellant.

The Attorney General and *Loomis Baldrey,* for respondent.

A. O. Colburn, amicus curiae.

TOLMAN, J.—This action is a direct attack upon chapter 174 of the Laws of 1921, commonly known as the "Poll Tax Law" [Rem. Comp. Stat., § 11242 *et seq.*] upon the ground that it is unconstitutional. From a judgment upholding the act, this appeal is prosecuted.

The act in question, among other things, provides for the collection of an annual tax of $5 from "All persons of this state, over twenty-one (21) years of age and under fifty (50) years of age, except idiots, insane persons, and persons supported at public expense," payable to the treasurer of the county where the taxpayer resides. It is further provided that each county assessor shall prepare a list of the names of all those in his county liable for the payment of the tax, to be certified by the county treasurer to the sheriff,

and it is made the duty of the sheriff to collect the tax by seizure and sale of property if necessary, and the treasurer and sheriff, in the name of the county, are empowered to invoke process in civil procedure to enforce collection. Section 5 of the act reads as follows:

"The various county treasurers shall on or before the first day of every month remit to the state treasurer four-fifths of all taxes collected under this act, and said taxes so remitted shall be deposited in the general fund and the county treasurers shall deposit the remaining one-fifth of said taxes collected in the current expense fund of their respective counties: *Provided,* That if the taxes collected under the provisions of section 8, chapter 1, Laws of the Extraordinary Session of the Legislature of 1920, shall prove insufficient to pay the interest and principal of the bonds issued under said act, then it shall be the duty of the Legislature to appropriate monies from the general fund to cover such deficiency in an amount not in excess of the monies transmitted to the general fund under this act." Laws of 1921, p. 676, § 5. [Rem. Comp. Stat., § 11246.]

Appellant's first contention is that the act violates § 12, of art. XI, of the state constitution, which reads:

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

in that one-fifth of the tax collected is retained by the counties and placed in their respective current expense funds, and hence, to that extent, it is a direct tax upon the individuals of the several counties for county purposes; and further, if any portion of the tax is illegal the whole must fall.

In approaching such a constitutional question the well-established rule that the courts will not declare an act of the legislature void unless it so clearly offends against the constitution that there can be no reasonable doubt upon the subject, must always be kept clearly in mind. Does this act so offend against the constitutional provision hereinbefore quoted? We are firmly of the opinion that it does not. It does not appear clearly, or at all, that the tax is imposed for county purposes, in whole or in part. As to the four-fifths to be paid into the state treasury, there is, of course, no question. As to the remaining one-fifth to be retained by the counties, we see nothing wrong or objectionable in the state, though not obliged to do so, thereby and to that extent reimbursing the counties for the cost of collecting the tax. No doubt the legislature recognized the fact that the counties have their own financial problems, and the burden which this act places upon them would greatly increase their current expenses, and therefore considered it but fair in opening up this new source of revenue to the state, while using the machinery of the counties for its collection, to make such an allowance from the fund realized as would, as nearly as could be anticipated, cover the cost. The requirement that the money thus retained shall be placed in the current expense fund, from which must be paid the county's expenses in collecting the tax, as well as its other current expenses, such as salaries, court costs, and the like, is strong evidence of the legislative intent in this respect. We know of no constitutional provision or rule of public policy which forbids such a course.

But, in any event, should we hold this particular provision invalid, the result would be the same, for § 10 of the act provides,

"If any section, subdivision, sentence or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act." Laws of 1921, p. 678, § 10. [Rem. Comp. Stat., § 11251.]

If, therefore, the provision permitting the counties to retain one-fifth of the amount collected offends against the constitution, the result would be that the whole amount collected would go into the state treasury, and appellant and those similarly situated would be relieved of no part of the burden which the law places upon them.

Appellant's second contention is that the act offends against § 5, of art. VII, of the constitution, which reads:

"No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

And in his brief, counsel for appellant says:

"In the first instance, the money is to go in the general fund, where in the usual course of events, and but for said proviso, it would be used for the payment of salaries and other current expenses not otherwise specifically provided for. Were it limited to this, it might be sufficient under the holding of this court, on the rather broad supposition that it is for meeting the current expenses of the state. But under the proviso contained in said section, it seems manifest that none of the moneys so derived can be expended for any of the purposes provided by general laws for the expenditure of such general fund until it can be determined whether there will be sufficient funds provided by the so-called Veterans' Equalized Compensation Act to meet the interest and principal of the bonds issued pursuant thereto."

This concession renders it unnecessary to reason out the sufficiency of the provision for placing the money

collected in the general fund, to fully comply with the requirement of the constitution, and leaves for discussion only the proviso in § 5 of the act. A careful reading of the proviso shows clearly that no part of the money to be raised under this act is thereby set aside or appropriated for the payment of principal or interest upon the bonds specified; that the money, as it is received, may be freely used as a component part of the general fund without reference to future contingencies, and at the most the proviso, if properly enacted; and if binding upon future legislatures, only requires that the amount received under this act shall be taken as the measure or limit of what may at some future time, upon the happening of the contingency named, be appropriated from the general fund for the purpose indicated. Clearly the object of imposing this tax was to increase the revenue flowing into the general fund, and thus facilitate the payment of those demands which other laws make or may make payable out of that fund.

Appellant's third and last contention is that the act is violative of §§ 1 and 2, of art. VII, of the constitution. Section 1 refers exclusively to the taxation of property, and provides that all property not exempt shall be taxed in proportion to its value. It does not in terms, nor by implication, forbid the raising of money by a tax not imposed on property. In fact, it expressly recognizes "other sources of revenue," without defining them, and we see no reason why a poll tax may not have been in the minds of the framers when they used that expression. Section 2 likewise relates exclusively to the taxation of property, and provides for a uniform and equal rate of assessment on all property, so that every person shall pay a tax in proportion to the value of his property. Neither

this, nor any other section of the constitution, contains any prohibition against a poll tax, and as is said in *State v. Ide,* 35 Wash. 576, 77 Pac. 961, 102 Am. St. 914, 1 Ann. Cas. 634, 67 L. R. A. 280:

"The tax in question is not a tax on property, but it is nevertheless a tax, under any proper definition of that term. It is a poll, or capitation, tax, and is so denominated both in the statute and the ordinances. It is levied for a public purpose, and is clearly a revenue measure. But its assessment is not governed by the general revenue law, or, strictly speaking, by § 2 of art. 7 of the state constitution, which declares that the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state according to its value in money.

"It is settled law that the power of taxation is a legislative power, and an incident of sovereignty, and when the people adopt a constitution and thereby create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of such general power. And, unless its power of taxation is limited by constitutional provisions, the state, by virtue of its sovereignty, has the power to tax all persons and property within its jurisdiction. Cooley, Taxation (2d ed.), pp. 4-5; (3d ed.), pp. 7, 8, 9, and cases cited. See, also, Judson, Taxation, § 431. Several of the state constitutions provide for the imposition of poll taxes, but such taxes are, it seems, prohibited by the constitutions of Ohio and Maryland. See, 1 Desty, Taxation, p. 296.

"Our constitution does not expressly mention such taxation, and, as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument, it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited from authorizing it to be levied by some provision of the constitution."

See, also, *Thurston County v. Tenino Stone Quarries,* 44 Wash. 351, 87 Pac. 634; *Tekoa v. Reilly,* 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 901.

As we have seen, our constitution does not, directly or indirectly, prohibit the imposition of a per capita tax, therefore the case of *State v. Ide, supra,* is absolutely controlling upon the point now under discussion, and also sustains our position upon the first question raised. Numerous authorities have been cited and discussed, but none from this court trench upon the doctrine laid down in the *Ide* case, and we deem it unnecessary to discuss those from other jurisdictions.

The judgment of the trial court is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16935. Department One. April 8, 1922.]

LELIA GONINON *et al., Respondents,* v. HARMON I. LEE *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS (381, 392)—USE OF STREETS—RATE OF SPEED—INSTRUCTIONS. Error cannot be predicated upon an instruction as to negligence in case the maximum speed was exceeded, where there was evidence from which the jury could reasonably conclude that the limit was being exceeded.

SAME (380, 392)—USE OF STREETS—ORDINANCES—CROSSINGS—INSTRUCTIONS. In an action by a pedestrian, struck by an automobile when about to board a street car stopping near a crossing, it is proper to instruct that a traffic ordinance as to the right of way "at any crossing," does not mean the exact mathematical lines of the street, but means close proximity to the line where a prudent person would have a right to be when proceeding to step upon a street car at the crossing.

Appeal from a judgment of the superior court for King county, Brinker, J., entered July 16, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

[1]Reported in 206 Pac. 2.

Van Dyke & Thomas, for appellants.

James A. Dougan, for respondents.

MITCHELL, J.—Respondent was struck and injured by an automobile driven by the appellant, on California avenue near its intersection with Lander street, in the city of Seattle, about 6:30 o'clock in the evening, February 9, 1921. She sued and recovered judgment in the sum of $500, from which an appeal has been taken.

There is a positive difference between the theories of the respective parties in their pleadings and proof as to how the collision occurred.

Section 72 of the traffic code of the city (Ordinance No. 41,695), plead in the complaint, is as follows:

"When overtaking or passing a street car on its right hand side, a driver of a vehicle shall bring such vehicle to a full stop before passing over or by any place, where a street car is stopping, or stopped, and shall not proceed when persons are getting on or off, or about to get on or off said street car, unless said driver can maintain a distance of at least six feet between said vehicle and the running board or lower step of such street car."

It was further alleged that the respondent was at the corner of the two streets, intending to take a southbound street car on California avenue at that crossing; that, as the street car approached Lander street, she looked to the north on California avenue for approaching vehicles and saw none, other than the one driven by the appellant, which at that time was some six hundred feet distant, driving toward her; that she stepped from the sidewalk to a point close to, and within two or three feet of, the west rail of the westerly or southbound street car track on the avenue, just in time to take the street car; that, while she was in that position,

and when the street car she intended boarding had come practically to a stop and the gates about to be opened to permit her to enter the street car, the automobile driven by the appellant approached, and in direct violation of the terms of the ordinance mentioned, drove within less than three feet of a street car, at a high rate of speed, and that by reason of such carelessness and negligence, ran upon her and caused the injuries complained of.

Strikingly different, the appellants, in their answer, rely upon certain sections of the traffic code which provide:

"Persons waiting for a street car shall not step into the street sooner, nor on leaving a car remain in the street longer than is necessary";

"Pedestrians shall have the right of way over vehicles at street intersections and crossings . . .; vehicles shall have the right of way over pedestrians between street intersections and crossings . . .";

"In crossing streets, pedestrians shall look out for vehicles and street cars, and particularly on the left, until reaching the center line of the street, and then on the right"; and

"No person shall stand or loiter in such a manner as to interfere with or obstruct traffic."

It is then alleged in the answer that the respondent, negligently and in violation of the ordinance, took a position on California avenue in direct line of automobiles traveling south, being west of the street car track and a number of feet east of the west curb of the avenue, at a point seventy-five to ninety feet north of Lander street, at a time when weather conditions and darkness precluded her presence and position being observed by an automobile driver until getting close to her; that the nearest street car traveling south was considerably more than a block in the rear of appellant's automobile; that the automobile was being op-

erated in accordance with the requirements of the ordinance and the law of the road; that appellant could not, owing to the weather conditions and darkness, see the respondent in the position she occupied until he arrived near her, when immediately he used the devices on the machine for stopping, and swerved the car, attempting not to strike her, but found it impossible to avoid injuring her.

Each party submitted substantial proof to sustain his pleading and theory, thus creating a situation peculiarly the province of the jury to decide.

The jury was instructed that, between street intersections, the maximum rate of speed allowed automobiles under the city law was twenty miles an hour, and that any greater speed would constitute negligence and entitle the plaintiff to recover unless her injuries were caused proximately by her own negligence. The instruction was excepted to, and it is now assigned that the giving of it was error, because there was no evidence in the case that the automobile was being driven at more than twenty miles an hour. If so, it is difficult to see how the instruction could have been prejudicial; but, while no one testified in express number of miles that the automobile was being driven at more than twenty miles per hour, there was evidence of distances and comparisons of time between the travel of the automobile and of the respondent from which the jury may have fairly and reasonably concluded the automobile was traveling in excess of twenty miles an hour.

The jury was instructed that the street intersection does not mean the exact mathematical line at which the north and south lines of one street cross the east and west lines of another street, but that it means any point close to the mathematical line where a person, acting reasonably and prudently, would have a right

to step for the purpose of either crossing the street upon which he was proceeding or step upon a street car at the crossing. The instruction was excepted to and is assigned as error. The section of the ordinance speaking of the speed of motor vehicles says: "At any crossing, etc.". The primary meaning of the word "at," as defined by Webster, is: "A relation of proximity to, or of presence in or on, something." As applied to the present case, the instruction was not out of place or incorrect.

The tenth instruction, which was excepted to, is sustained by the case of *Moore v. Roddie,* 103 Wash. 386, 174 Pac. 648.

The giving of a number of other instructions, which were excepted to, constitutes other assignments of error. The argument upon these assignments is that the instructions were inapplicable, a contention resting upon appellant's views of what the clear preponderance of the evidence in the case was. But the preponderance of the evidence is a matter for the jury in all cases, such as this, where there is a conflict of substantial proof in favor of each of the parties to the controversy. The instructions complained of were justified and correct upon respondent's theory of the case.

It is also assigned as error that the court refused to give a number of instructions requested in writing by the appellants. They are in no manner argued in the briefs nor orally, and from the examination of the record we are satisfied that, to the extent they expressed correct rules of law applicable to the case, they were sufficiently included in instructions that were given.

Finding no error, the judgment is affirmed.

PARKER, C. J., HOVEY, FULLERTON, and TOLMAN, JJ., concur.

[No. 16967. Department Two. April 8, 1922.]

EDGAR L. OSBORN *et al., Respondents,* v. MARVIN CHASE *et al., Appellants.*

JOHN D. DILL *et al., Respondents,* v. MARVIN CHASE *et al., Appellants.*[1]

WATERS AND WATER COURSES (99)—IRRIGATION—REGULATION OF SUPPLY. Where a decree apportions the water of a stream to various tracts, one user not actually prejudiced cannot complain because another user of two tracts diverts the percentage apportioned to one of his tracts and uses it all upon the other.

SAME (99). Where a decree apportions water of a stream to various tracts on a percentage basis, the adoption of a rotation plan does not entitle a lower owner to have a pond on the land of an upper owner completely drained on the days he is allowed to use the water, when only the overflow joins the stream, where the pond is filled from the upper owner's share of the water.

SAME (99). Where the waters of a stream have been apportioned by a decree of court on a percentage basis, the hydraulic engineer can only enforce the decree and cannot order a rotation plan conflicting with the percentages.

Appeal from an order of the superior court for Chelan county, Grimshaw, J., entered August 8, 1921, in favor of the plaintiffs, directing the state hydraulic engineer to apportion the waters of a stream for irrigation purposes, after a hearing before the court. Reversed.

The Attorney General and *Fred J. Cunningham, Assistant,* for appellant Marvin Chase.

W. O. Parr and *Carroll B. Graves,* for appellants Murray *et al.*

Barrows & Hanna and *John D. Dill,* for respondents.

HOVEY, J.—These are consolidated cases wherein the respondents sought to review what they considered an

[1]Reported in 205 Pac. 844.

order of the hydraulic engineer relative to the apportionment of water.

The trial court entertained the appeal, took testimony, and, at the conclusion thereof, entered an order referring the matter back to the hydraulic engineer, with directions to make a new order and to assume as a basis certain principles of division, concerning which appellants Thompson and Murray complain.

Swakane creek is a small stream in Chelan county, fed principally by springs, and carrying, during the irrigating season, a maximum of about one hundred inches of water. In the year 1910, the waters of the stream were apportioned to various parties by a decree of the superior court of Chelan county. The award was by percentages, and each party was awarded his percentage, as against all other parties to the action, throughout the season. After the entering of the decree, the parties voluntarily entered into a rotation plan by which each party was allowed to use the entire flow for a certain period. As originally awarded, a certain percentage was allowed because of the ownership of lands lying at the head of the stream, and these lands have never been developed, but the appellants, who are successors in interest of the owners of these lands and the water awarded because of such ownership, are also the owners of land further down the stream, and are undertaking to transfer the water awarded because of the ownership of the higher lands for use upon their lower lands. The respondents object to this transfer and take the position that, unless the water is actually used upon the land to which it is awarded, it should be treated as abandoned water and belong to the stream. The respondents do not own any land, however, between the higher lands mentioned and the point where appellants take the water from the

stream for the use on their lower lands, and the testimony does not show that they are prejudiced in any manner by the transfer. For several years the parties have used a pipe line as a substitute for a portion of the channel of the stream.

Another phase of the controversy is the use to be made of a shallow pond situate upon the land of appellant Thompson. The testimony shows that there was formerly a swamp at this place and that, when the land was cleared up, this pond was substituted for the swamp. Any overflow from this place is tributary to the stream. It is the contention of the respondent Dill, whose lands lie below those of Thompson, that, when the rotation plan is followed, this pond should be completely emptied on the days when he is allowed to use the water, and the testimony in behalf of Thompson shows that it would consume most of his period to refill the pond.

The hydraulic engineer appeals from the order entered by the trial court, contending that all that he did was to suggest a plan for rotating water, and that he did not intend his communication to operate as a final order. The proceeding was initiated by a petition to the hydraulic engineer to adopt a plan for rotation of water, and in response thereto that official issued a communication in which he uses language that the respondents were justified in accepting as a determination of the hydraulic engineer to apportion the water according to the proposed schedule attached to the communication.

The proceeding in question should be considered to be under the provisions of § 11 of ch. 117, p. 452, Laws of 1917 [see Rem. Comp. Stat., § 7361], by which an appeal is allowed from any order, etc., of the hydraulic engineer, and not under the provisions of §§ 14-26,

pp. 454-459 [Rem. Comp. Stat., §§ 7364-7377], whereby the hydraulic engineer is authorized to institute a proceeding to have the court decree property rights in water.

In our opinion, the order of the trial court is erroneous in applying the principles of law upon the facts as made in the record.

Assuming, without deciding, that the original riparian character still attaches to these waters since the decree apportioning them, no complaint can be made by one user of water against a change in the point of diversion by another user unless he is prejudiced thereby. 1 Wiel, Water Rights (3d ed.), § 754; 2 Kinney, Irrigation and Water Rights (2d. ed.), p. 1501.

Appellants are entitled to use upon their lower lands the percentage of water awarded because of the ownership of the higher lands now owned by them.

As to the use of the pond, so far as it is supplied by drainage from the land around it, the appellant Thompson is entitled to continue its use and cannot be compelled to release stored water to the respondent Dill, but any overflow must be permitted to rejoin the stream; and in case appellant Thompson desires to use any of the water from the main stream to replenish the pond it must be done from the portion of water belonging to him.

The rights of the parties to this action in the waters of this stream are defined by the original decree, and unless they can agree upon some plan of rotation, all that the hydraulic engineer can do is to give to each party the percentage awarded him by the decree.

The judgment is reversed for further proceedings in accordance with this opinion.

Holcomb, Mitchell, Main, and Mackintosh, JJ., concur.

[No. 16721. *En Banc.* April 10, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. CLAUDE D. RUST, *Appellant*.[1]

PHYSICIANS AND SURGEONS (4-1, 5)—REGISTRATION OR LICENSE—STATUTES—"OSTEOPATHS"—OPTOMETRY. Section 15 of the Optometry Act [Rem. Comp. Stat., § 10159] excepting from its operation "any regularly licensed occulist or physician who is regularly licensed to practice medicine," has no application to osteopathic practitioners, who, under the history of the legislature of the state are not regularly licensed to practice medicine.

SAME (4-1, 5). The practice of osteopathy does not include the practice of optometry, although an osteopath may treat the eye osteopathically.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered April 29, 1921, upon a trial and conviction of practicing medicine without a license. Affirmed.

Hayden, Langhorne & Metzger, for appellant.
J. W. Selden and *Earl V. Clifford*, for respondent.

MITCHELL, J.—The appellant, Claude D. Rust, was informed against in the superior court of Pierce county for the crime of practicing optometry, on or about January 16, 1921, without first obtaining a certificate of registration or other permit from the state board of examiners and filing the same with the county clerk, he not being a regularly qualified oculist or physician who is regularly licensed to practice medicine in this state, and more especially did practice optometry by displaying an advertisement in the Tacoma Sunday Ledger setting himself forth as an eye specialist. A copy of the advertisement is in evidence wherein, in substance, he declared himself as "The people's eye

[1]Reported in 206 Pac. 33.

specialist," that he had "reduced prices on all eyeglasses," advertised different kinds of eyeglasses and their mountings, stated therein "all work absolutely guaranteed" and signed "Dr. Rust," giving his office location in the city of Tacoma. To the information he entered a plea of not guilty, waived a jury trial, submitted the case on testimony that practically amounted to an agreed statement of facts; and from a judgment of guilty and the imposition of a fine of $25, this appeal has been prosecuted.

The essential facts alleged were proved without dispute. The defense was and is that he is the holder of a valid unrevoked license to practice osteopathy, dated July 10, 1909, that he was practicing as an osteopathic physician and falls within the provision of § 15, Laws of 1919, p. 405, of the optometry act.

There is but one assignment of error, and that is "adjudging the defendant guilty and imposing a fine of $25.00."

The optometry law is found at ch. 144, Laws of 1919, p. 396. It is entitled "An act defining the practice of Optometry, providing for the regulation of the same, creating a Board of Examiners and providing penalties for the violation thereof." Certain portions of the act, material here, are as follows:

"Section 1. Any person shall be deemed to be practicing optometry within the meaning of this act, who shall in any manner, except as provided in section 15 of this act, 1st, display any sign, circular, advertisement or device purporting or offering to in any manner examine eyes, test eyes, fit glasses, adjust frames or setting himself or herself forth as an optometrist, optician, specialist, optical specialist, eyesight specialist or refractionist, with intent to induce people to patronize himself, herself, or any other person; 2d, who shall make in any manner a test or examination of the

eye or eyes of another, to ascertain the refractive, muscular or pathalogical condition thereof; 3d, who shall in any manner adapt lenses to the human eye for any purpose either directly or indirectly." Laws of 1919, p. 396.

Section 2, p. 396, makes it unlawful to practice optometry without first obtaining a certificate of registration or permit from the board of examiners. Section 3, p. 396, creates the state optometry board, to be composed of three regularly registered optometrists. Section 4, p. 397, defines the duties and powers of the board. Section 5, p. 400, prescribes the qualifications of and the manner of the examination of applicants. Section 6, p. 400, makes it the duty of each county clerk to keep an "Optometry Register" for the registration of each optometrist who presents a certificate from the board of examiners. [See Rem. Comp. Stat., §§ 10148 to 10151.]

Section 15 of the act is as follows:

"Nothing in this act shall be construed to pertain in any manner to the practice of any regularly qualified oculist or physician, who is regularly licensed to practice medicine in the state of Washington, nor to any person who in the regular course of trade, sells or offers for sale, spectacles or eyeglasses as regular merchandise without pretense of adapting them to the eyes of the purchaser, and not in evasion of this act." Laws of 1919, p. 405, § 15. [Rem. Comp. Stat., § 10159.]

In his brief appellant says: "The question then that comes to this tribunal for solution is simple in the extreme: It is this: Is a duly licensed osteopathic physician 'a regularly qualified physician' within the meaning of the proviso in Section 15, *supra,* of the optometry act?"

As we understand the real inquiry, that contention is wrong. On the contrary, the question in the case is this: Is one who is duly licensed to practice osteop-

athy embraced within the words "the practice of any regularly qualified oculist or physician, *who is regularly licensed to practice medicine* in this state," found in § 15 of the act?

The manifest difference between the two statements, or forms of questions, indicates the essential error into which we think the appellant has fallen, and because of which many authorities cited by him to ascertain a proper definition of the word "physician" are not helpful here. Nor are we persuaded, as helpful to the appellant, by the quotation from *State v. Bonham,* 93 Wash. 489, 161 Pac. 377, L. R. A. 1917D 996, viz.:

"The purpose of osteopathy is to heal the sick, and it is not denied that the treatment it affords, even in its most restricted use, falls within the generic meaning of the terms 'medicine and surgery.'"

We are not persuaded because immediately following the quoted language this court said:

"But the question here is not this. It is much more narrow. It is, rather, did the appellant's certificate of practice authorize him to resort to the form of treatment he resorted to in the particular instance. It is our conclusion that it did not."

It is entirely clear that the reason for the conclusion reached in that case upholding the conviction of the defendant was as stated therein,

"The statute makes it plain, we think, that its framers regarded the practice of medicine and surgery and the practice of osteopathy as separate and distinct methods of treating the sick and afflicted, and intended to confine the practitioners of each to the particular system he professed to practice;"

And so it must be reasoned in this case. The question here is not whether one licensed to practice as an osteopath may heal the sick, or employ a treatment that falls within the generic terms "medicine and

surgery." It is much more narrow. It is, rather, did the license or certificate which the appellant held to practice osteopathy qualify him as an oculist or physician who was *regularly licensed to practice medicine* within the meaning and intent of § 15 of the optometry act?

Nor do we find any help in the case of *People v. Gordon,* 194 Ill. 560, 62 N. E. 858, 88 Am. St. 165, relied on by the appellant. It was a case wherein "all the testimony tends to show that he practiced what is known as osteopathy—at least the treatment was of that nature." The medicine and surgery act of that state (Ill.) authorized the state board of health "to divide those who desired to practice medicine into two classes, that is, those who desired to practice medicine and surgery in all their branches, and those who desired to practice any other system or science of treating human ailment without the use of medicine or instruments." The defendant in the case had no license of any kind, and his defense was that he had not used any instrument, drug, medicine or material remedy of any kind, and hence had not practiced medicine within the terms or intent of the law. But the court held otherwise, because of § 7 of the act which provided: "Any person shall be regarded as practicing medicine, within the meaning of this act, who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to, or deformity of, another:" (Laws of Ill. 1899, p. 275.) The conclusion reached in that case was clearly warranted upon a proper construction of the statutes involved. Other cases cited by appellant are to the same general effect and afford no light other than that already apparent that consideration must, after all, be given to the terms of the applicable statutes of this state.

The legislature of this state refused to recognize the merits and progress of the osteopathic school as a mode or system for the treatment of the sick and afflicted until the year 1909. In that year a law was enacted, Laws of 1909, ch. 192, p. 677; Rem. Code, § 8386 *et seq.* (P. C. § 3727 *et seq.*), entitled "An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the State of Washington, and for the appointment of a board of medical examiners, in the matter of said regulation, and declaring an emergency." The act provided for the appointment of a board of medical examiners consisting of nine members, five of whom should be chosen from the regular profession, two from the homeopathic profession, and two from the osteopathic profession. The board was given power to issue certificates to those entitled to engage in the art of healing. Three forms of certificate were provided for: "First, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the holder thereof to practice osteopathy; third, a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or afflicted not referred to in this section." In § 20, p. 688, of the act it was provided that the holders of certificates should "use no deception in the use of titles of his or her mode of treating the sick, but shall use only such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she holds license to practice." Thus it appears that, in the title of the act, and in those portions of the body of the act pertaining to the forms of certificates or licenses issued and the manner in which the practitioner should hold himself forth to the public, there

was a complete segregation or classification of the different schools—the one to practice medicine and surgery, another osteopathy, and another any other system or mode of treating the patient. It was under this law the appellant was licensed to practice osteopathy. It is worthy of notice that the same legislature that denominated the practice of those of the regular profession as the practice of medicine and surgery, the practice of those of the osteopathic profession as the practice of osteopathy, and all others treating the sick in still another class, later on at ch. 235, p. 850, Laws of 1909, enacted the first law of this state regulating the practice of optometry, and that § 13, p. 855, of the act is in legal effect the same as § 15 of the current optometry law of 1919, hereinbefore quoted. [Rem. Comp. Stat., § 10159.]

In 1919, the legislature made other advances. It created four licensing boards, each acting independently of all others for the licensing of those engaged in the treatment and healing of the sick or afflicted. One issues licenses to practice medicine and surgery (ch. 134, p. 372 [Rem. Comp. Stat., § 10008]); another one issues licenses to practice osteopathy or osteopathy and surgery (ch. 4, p. 4 [Id., § 10056]); another one issues licenses to practice chiropractic (ch. 5, p. 18 [Id., § 10098]); and still another for the regulation of the practice of drugless healing (ch. 36, p. 64 [Id., § 10112]). Following all of these acts, the same legislature enacted the present optometry law.

Chapter 4 is entitled "An act to regulate the system, method or science of healing known as osteopathy . . ." Section 19, p. 17, of the act provides:

"This act shall not be construed to apply in any manner to any other system or method of treating the sick or afflicted . . ." [Rem. Comp. Stat., § 10071.]

Section 20, p. 17, provides: "On all cards, signs, letter heads, envelopes and bill heads used by those licensed by this act to practice osteopathy or osteopathy and surgery the word 'osteopathic' shall always immediately precede the word 'physician,' and if the word 'surgeon' is used in connection with said name, the word 'osteopathic' shall also immediately precede said word 'surgeon.'" [Rem. Comp. Stat., § 10072.]

Chapter 134, *supra*, is entitled "An act relating to the practice of medicine and surgery, amending sections . . . of Remington & Ballinger's Annotated Codes and Statutes of Washington." Section 3, p. 373, of the act prescribes the qualifications required for certification; among other things, a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting the diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year, etc., and further provides for only one form of certificate or license. The section further says:

"Upon compliance with the requirements of this act by an applicant for a license to practice medicine and surgery in this state, the board shall issue such certificate, authorizing the holder thereof to use drugs or what are known as medicinal preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions." [Rem. Comp. Stat., § 10008.]

The authority given by this form of license covers a field that is all inclusive, while that of each of the other kinds of practitioners is limited in its scope.

The declaration in § 15, *supra*, of the optometry act is couched in language that was familiar to the legislature. It refers to a class created by it and describes

that class in distinguishing terms of its own selection. It cannot be construed as sufficiently elastic to except from the general provisions of the act one who is only a regularly qualified physician in the state of Washington, nor any regularly qualified physician who is regularly licensed to practice osteopathy. It does not say so. On the contrary, it is clear and unambiguous, for it says: "Any regularly qualified oculist or physician, who is regularly licensed to practice medicine in the state of Washington." The words are plain of what was intended, if we but consider they were used by a body that had lately so often declared what it meant by these words.

Somewhat as a departure from, although akin to what was claimed to be the sole question in the case, it appears to be further contended by the appellant that he should be held not guilty because the acts committed by him were permissible under his license to practice osteopathy, notwithstanding the optometry act. If it be allowed that, without an exception, the optometry law is not enforcible against one who is otherwise authorized to practice it, which we do not here decide, still, under the facts in this case and the law as we view it, the judgment must stand.

The act of 1919 regulating the practice of osteopathy does not define the method or science except by reference. That reference is answered, however, we think, by the case of *State v. Bonham, supra,* and the more recent case of *In re Rust*, 181 Cal. 73, 183 Pac. 548. The California case was strikingly similar to the present one, indeed, almost exactly like it. It was a case of the conviction of a licensed osteopathic doctor for violating the optometry act of that state without his being a registered optometrist. The statute of that state regulating the practice of osteopathy, like ours,

did not define osteopathy. The optometry act of California contained an exception in favor of duly licensed physicians and surgeons, and it was claimed by the defendant that he came within the exception. But the court held against him for the reasons, as given by the court, that the medical act provided that osteopaths be given a different kind of certificate from those issued to physicians and surgeons, and because of prior legislation in which osteopaths were placed on a different basis than physicians and surgeons. In that case it was also contended, just as it seems to be here, "that his license to practice osteopathy authorizes the practice of optometry because the practice of optometry is included in the practice of osteopathy." But the point was decided against him, in a well-reasoned opinion which we adopt without a detailed analysis of it.

The evidence in this case shows that osteopathy embraces a full course on the ear, eye, nose and throat, and that is the extent of the proof on the subject. That study is necessary, of course, to prepare one to properly treat those organs osteopathically. But that practice or treatment is not optometry as defined by our statute, nor is it the kind of act for which the appellant was convicted.

Affirmed.

ALL CONCUR.

[No. 16821. Department One. April 10, 1922.]

H. O. MULLINS, *Appellant*, v. S. P. LARSEN *et al.*, *Respondents.*[1]

LOGS AND LOGGING (1)—SALE OF STANDING TIMBER—CONTRACTS—FORFEITURE. A forfeiture of a contract for the sale and removal of standing timber must be on one of the grounds specified in the notice of forfeiture.

SAME (1)—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a forfeiture of a contract for the sale of standing timber, on account of leaving merchantable timber on the ground, where many witnesses testified that it was unmerchantable, and if a breach of the spirit of the contract, the loss was fully covered by an advance payment.

SAME (1)—WAIVER. The seller's right to forfeit a contract for the sale of standing timber to be cut and hauled to the vendee's mill, on the ground of his removal of the mill, is waived by accepting stumpage on shipments elsewhere, as agreed upon.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered January 27, 1921, upon findings in favor of the defendants, in an action on contract, tried to the court. Reversed.

R. W. Greene, for appellant.

Sather & Livesey, for respondents.

TOLMAN, J.—Appellant, as plaintiff below, brought this action to recover damages for the alleged wrongful forfeiture of a contract for the purchase and removal of timber. From a judgment denying him the relief sought, he has appealed.

It appears that, on October 18, 1918, the parties hereto entered into a written contract by the terms of which respondents, as owners of the land, agreed to convey to appellant all merchantable timber upon certain described real estate, at the agreed price of $1.50 per

[1]Reported in 206 Pac. 4.

thousand feet; the stumpage to be determined by a scale of the lumber cut therefrom at appellant's mill; this scale to be made monthly, on or before the 5th day of each month, of all timber cut during the preceding month, and payment to be made immediately upon the completion of the scale. Appellant, according to the terms of the contract, paid $500 as earnest money in advance, to be credited only upon the stumpage for the timber last to be cut. No time was specified in the contract in which the work of removal of the timber should begin, nor was there any provision requiring the appellant to remove any timber whatever, or any particular portion in advance of any other portion; nor was there any stipulation with reference to the manner or method in which the work of removal of the timber should be conducted. Without objection, appellant began the removal of the timber in May, 1919, and continued to remove and saw it at his mill until October, 1919, without furnishing any scale or paying any part of the stumpage, except as respondents had received from him a small quantity of shingles and wood, the price of which was to apply on the stumpage due. About the end of October, 1919, appellant ceased to operate his mill, began to remove it, and negotiations were then had between the parties which resulted in respondents receiving all of the money then due them for stumpage (though no scale sheets were furnished until the time of the trial below), and an agreement that the logs from respondents' land should thereafter be sold to a third party operating a mill some miles distant; such purchaser to scale the logs and pay to respondents their stumpage monthly. This arrangement was carried on until June, 1920, respondents usually receiving their stumpage money from the purchaser of the logs; but some payments on account

thereof were made by Small & Slater, a copartnership, which, during appellant's operation of his own mill, through some arrangements with him, had done the actual work of cutting and removing the logs. Small & Slater, after the agreement to sell the logs to the third party, continued to cut and transport the logs to the purchaser up until the time when operations ceased. So far as appears, respondents, in the early part of June, received from the purchaser full payment of all stumpage accruing upon all logs so shipped up to June 1, 1920.

It now appears that appellant, by some oral arrangement with Small & Slater, permitted them to proceed with the work of logging under his contract, reserving to himself one dollar per thousand feet on all logs cut and removed, and on or about June 14, 1920, appellant brought suit against Small & Slater, presumably to recover the amount thus due him, and caused a writ of garnishment to issue to, and be served upon, the Belpak Lumber Company, the purchaser of the logs. Small & Slater continued logging operations after the garnishment was served, shipped five cars of logs, and then ceased operations, at about the time the forfeiture notice hereinafter referred to was served. Whether they so ceased to operate because of the pendency of the action in which the garnishment was issued, because of the attempted forfeiture, or because at about that time appellant removed his donkey engine and equipment which they had been using, does not very clearly appear, but there is sufficient, in the absence of evidence to the contrary, to raise the presumption that logging operations ceased because of the acts and attitude of respondents. It does, however, clearly appear, by the testimony of the manager of the Belpak Lumber Company, that the garnishment referred to

had no effect upon the moneys due or to become due respondents for stumpage, and that the mill company afterwards, and before the trial of this action, paid to respondents the stumpage accruing upon the logs shipped during the month of June. On June 19, 1920, respondents caused to be served upon appellant a notice of forfeiture, in which the grounds upon which the claim of forfeiture was based are set forth as follows:

"Some of the reasons for terminating said contract and declaring forfeited the rights of the second party thereunder are as follows:

"That second party cut merchantable timber on the tract of land therein described and has permitted the same to remain in the log and lie on the ground where cut, and the same, has become deteriorated and unmarketable by reason of lying so cut for a long period of time;

"That the second party voluntarily removed the mill where said timber, under said contract, was to be marketed and thereby destroyed the agreed market for said timber in said contract;

"That second party on or about September, 1919, abandoned the said contract and the cutting of said timber thereunder and ceased to perform the conditions of said contract on his part to be performed.

"That second party has cut, removed and sold large quantities of said timber and has never furnished first party any scale of any part thereof, as stipulated should be done.

"You are further notified not to hereafter trespass upon the land described in said contract."

We think it is elemental that, if the attempted forfeiture is upheld, it must be upon some one or more of the grounds specified in the notice, and we have therefore studied the record with the view of determining whether any of such grounds are proven by the evidence. First, does the proof show that appellant, or Small & Slater, left merchantable logs lying in the woods until they became unmerchantable? Appellant

testified that not exceeding 15,000 feet of logs were left on the ground and at the sidings, none of which was merchantable timber. Some, he admits, was piling timber, and half of that amount he says was conky. Appellant's witness Frank testified that about 15,000 feet of logs were cut and left lying, a good part of which were eight inches and less at the butt, and therefore unmerchantable. The large first-growth logs included were all conky, and the only reason these logs were left was because they were not merchantable and would not pay for handling. Appellant's witness Galbraith testified that there was about 25,000 feet of logs left, a considerable part being small and unmerchantable. Some of the large logs were conky, and there were a few pretty good logs left. As to these he said, "It looked to me like they had intended to take them out but hadn't got to them." Witness Puckett testified that there was some merchantable timber cut and left, and gave his opinion that lack of finances was the cause for so leaving the logs. Respondent S. P. Larsen testified that a good deal of merchantable timber was cut and left, but did not count the logs or scale them, and did not pretend to say what, in measurement, they would amount to. Respondents' witness Rothenbuhler testified that, in the first part of the work, the logs were taken fairly clean, but further back he found one soft place, hard to get at, of about an acre in extent, where the logs were cut and bucked but none had been taken out. He did not scale these logs and could not estimate the quantity in feet; and in another place which was hard to reach he saw other logs. On cross-examination this witness testified that most of the logs he saw were such as would be picked up by a logger going ahead with his job.

Conceding, for argument's sake, that respondents protested against the leaving of any merchantable tim-

ber, and that such leaving, if any, was not caused by the attempted forfeiture, but was a breach of the spirit of the contract, though not of its expressed terms, yet, in view of the evidence referred to and the advance payment of $500, which would amply protect respondents upon final settlement, we cannot hold that a forfeiture was warranted on this ground.

As to the removal of appellant's mill, given as the second ground for forfeiture, respondents are in no position to complain. They, with knowledge of the removal, agreed to the shipment of the logs elsewhere thereafter, and accepted the stumpage thereon from the purchaser, thereby waiving any right, if indeed they ever had a right, to declare a forfeiture therefor.

There is no evidence whatever tending to establish the abandonment of the contract by appellant, as specified in the third ground set forth in the forfeiture notice.

There was some evidence introduced at the trial on the fourth ground set forth in the forfeiture notice to the effect that certain cedar logs had been shipped elsewhere and no stumpage paid thereon, and the trial court so found. The forfeiture notice, and the pleadings upon this subject, are so general and indefinite that appellant may well have assumed that the charge that he had "cut, removed and sold large quantities of timber without furnishing a scale of any part thereof," referred to the time of the early operations when the timber was cut at his own mill and no scale was furnished; and therefore he may well have been surprised by the testimony offered. The showing made upon the motion to reopen the case and upon the hearing of the motion for a new trial, with reference to the claimed shipment of cedar logs, was of such a character as to make it apparent that no final judgment should have

been entered without receiving and considering the evidence thus offered. In that respect we feel that the trial court erred.

The judgment is therefore reversed, and the cause remanded for a new trial, upon which the question of forfeiture shall be limited to the issue last discussed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16916. Department One. April 10, 1922.]

EMIL OLSON *et al., Respondents,* v. ANDREW O. SOLBERG *et al., Appellants.*[1]

CONTRACTS (3)—CERTAINTY—TIME AND PLACE. An agreement whereby the logging engine was to be returned to the sellers for their use during the following summer for the purpose of completing the logging of a certain forty acres is sufficiently definite as to the period of time covered.

DAMAGES (118)—MEASURE—BREACH OF CONTRACT—PREVENTING PERFORMANCE—LOSS OF PROFITS. Plaintiff's damages for breach of contract for the use of a logging engine are sufficiently shown by proof of the value of logs lost by inability to obtain any other engine to complete his logging contract within its time limit.

Appeal from a judgment of the superior court for King county, Brinker, J., entered June 24, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Thos. R. Horner, for appellants.

F. B. Carpenter, for respondents.

TOLMAN, J.—In November, 1918, appellant Andrew O. Solberg purchased from the respondents a donkey engine which they had theretofore used in carrying on certain logging operations. The cash purchase price

[1]Reported in 206 Pac. 10.

was $800, which was fully paid, and possession of the engine given. Respondents claim that, in addition to the cash consideration, it was mutually agreed that, while title should immediately pass; yet, as part of the consideration for the sale, respondents should have a right to the use of the engine during the following summer for the purpose of completing their logging operations upon a certain described piece of land situated not far from appellants' home. No bill of sale or written memoranda evidencing either the sale or the alleged conditions was made. In August, 1919, appellant permitted respondents to take the engine, as he claims, solely for the purpose of clearing an acre or so of land adjoining his premises, for the reason that the logs, brush and trash thereon clogged up a ditch which had been constructed across the tract, or otherwise impeded the flow of flood waters, so that in periods of high water this debris caused the flooding of that particular acre, and also of appellants' land adjoining; while respondents claim that they were given possession of the engine not only for the purpose just stated, but also in pursuance of the original agreement that they might complete their logging operations.

After using the engine for a short time for the purpose first stated, respondents removed it to the scene of their logging operations, and there kept it some three weeks, though it was in actual use but a portion of that time. Appellant was away from home when the engine was so removed, and after returning and learning what had been done, he demanded a return of the engine to him. His demand not being complied with, he, within a day or two, took possession of and removed the engine to his own premises. Thereafter respondents brought this action to recover damages for the alleged wrongful act of appellants in removing

and denying them the use of the engine. The cause was tried to a jury, which returned a verdict against the appellants in the sum of $500, and from a judgment on the verdict, this appeal is taken.

Certain assignments of error were made based upon the denial of a motion to strike from the complaint, the denial of a motion to make more definite and certain, the overruling of a demurrer, and the like, all of which were waived upon oral argument; and thereafter this waiver was confirmed in writing, and the case submitted on its merits as an action for breach of contract. There remains, therefore, for us to consider only whether there was sufficient evidence to go to the jury upon the question of what was the contract, and whether there was any competent evidence as to damages which will sustain the verdict.

Upon the first point, the evidence was directly conflicting and not decidedly preponderating in either way, but appellants contend that the terms of the condition, as testified to, were so uncertain as to make it unenforceable, in that the time when the engine should be returned to respondents for their use, or the length of time that they might keep and use it, were not definitely fixed. But this testimony of the respondents is quite clear and definite to the effect that it was agreed that they should have the use of the engine during the summer following the sale, for the purpose of completing the logging of a certain forty-acre tract specifically described. This we hold was sufficiently definite.

Upon the question of damages, the evidence is not wholly satisfactory, but there was competent evidence to the effect that respondents had purchased the standing timber upon the land referred to, with a time limit as to its removal; that, because of the wet and marshy condition of the land, logging could be successfully

carried on only in the summer months; that, at the time appellant took away the engine, there was cut about 100,000 feet of logs, which had been scaled, and the exact number of feet of cedar, spruce, fir and hemlock was testified to by the scaler. Less than half of these logs had been drawn out and piled ready to be loaded on trucks and transported to the river, and there still remained, besides the logs in the woods, some timber still to be cut; that the logs could be put in the river at an expense of about $5 a thousand feet, and floated down to a boom company which had agreed to gather, scale and market them, making a charge for its services of $1 per thousand, and the market prices, at the boom, of logs of various kinds and grades covering all of the kinds here in question was shown from the time the engine was taken away down to July, 1920, so as to fully cover any possible delay in floating or marketing the logs. There was testimony that no engine could be obtained to take the place of the one removed, and that respondents were wholly unable to get their logs to the river, and lost them by the expiration of the time limit in their contract for removal, solely because of appellants' wrongful act.

In the light of this testimony, which the jury was entitled to accept or reject, we cannot hold that the verdict is unsustained by the evidence, or that it is excessive in amount.

The judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16941. Department Two. April 10, 1922.]

ROBERT ORTEL *et al., Respondents,* v. J. E. STONE *et al., Appellants.*[1]

NAVIGABLE WATERS (1)—LAKES—WHAT CONSTITUTES. A small lake covering forty acres, from ten to fifty feet deep at any point fifty feet from the shore, is a navigable lake, although it has never been used for navigation.

WATERS AND WATER COURSES (1)—APPROPRIATION. The water between high and low water mark in a navigable lake is subject to appropriation for irrigation.

SAME (10-13)—APPROPRIATION—PRIORITIES—QUANTITY. The measure of the rights of a prior appropriator who claimed all the waters of a navigable lake for irrigation is the amount of water actually taken and put to a beneficial use, and the same cannot be increased by subsequent needs, as against a subsequent appropriator.

SAME (10, 15)—APPROPRIATION—PRIVITY—CHANGES. A subsequent appropriator of surplus waters in a lake has the right to add and store waters in the lake for his use, subject to prior rights, and under supervision of the hydraulic engineer under Rem. Comp. Stat., § 7396.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered February 8, 1921, in favor of the plaintiffs, in an action to enjoin the use of the waters of a lake for irrigation purposes. Modified.

W. C. Gresham, for appellants.

P. D. Smith, for respondents.

HOVEY, J.—This action involves the right to the use of the waters of Davis Lake, in Okanogan county, Washington. The main lake has an extreme length of three-fourths of a mile, and an average width of about one-eighth of a mile, and is about forty acres in area. At its ordinary stage it is forty or fifty feet deep in

[1]Reported in 205 Pac. 1055.

its deepest place, and its shallowest portion at any point fifty feet from the bank is about ten feet deep. It has no visible outlet. Lying to its north is a shallow arm which dries up at low stage of water. The supply of water for this lake is chiefly from spring freshets and from Bear Creek, which has for its tributary Bowen Creek. Whether these creeks naturally flow into the lake is not made clear from the testimony. Respondents own a considerable body of farming land which is not riparian to the lake, and have under irrigation about sixty-five acres of land, cultivation of which was commenced some seventeen years prior to the trial. The first water used by respondents was taken directly from Bear Creek, and measurements made by a civil engineer in September, 1919, showed them to be receiving from this stream directly, sixty-two hundredths of a cubic foot per second of time, but respondents assert that they have title to only one-half of the flow of Bear Creek.

In June, 1903, respondent Robert Ortel and H. E. Seneff and John M. McCrea posted and filed a notice of appropriation of fifteen cubic feet per second of time of the waters of Bowen Creek, and in which notice they claimed the right to store said quantity of water in Davis Lake, "with the right to occupy and use said Davis Lake and the whole thereof for the purposes of said storage." The testimony shows that McCrea and Seneff had previously done some work towards securing water directly from Davis Lake, and on June 24, 1903, filed a notice in the office of the auditor in which they claimed one million cubic feet of the waters of the lake for the irrigation of their lands, and thereafter the three men made a cut in the bank of the lake through which they diverted water and conveyed the same to their lands; but McCrea and Seneff used the

water for only one season, and in the year 1911 Seneff conveyed his rights in the waters of the lake and the creeks to the respondent, and a man whom respondent claims was the successor in interest of McCrea made a like conveyance to the respondent. Respondent has been the only user of the water through the cut except for the period mentioned. During the non-irrigating months, respondent causes the waters of Bear and Bowen Creeks to empty into the lake to provide storage for the irrigating season. Respondent has a low dam which keeps the water of the main lake from wasting in the shallow arm during low stages of water.

Appellants own lands bordering upon the lake, upon which they have about seventeen acres of orchard and about fourteen acres of alfalfa. The trees have grown without irrigation, but have now reached the bearing stage where they require irrigation to properly produce fruit. Appellants are undertaking to irrigate their land by pumping from the lake. They first used water from this source during the year 1918, and continued such use in the year 1919, putting into the lake that year water from another source, when the respondents brought this action to enjoin the appellants, claiming that the water which appellants take would so lower the level of the lake that the water would not flow through the intake of respondents' ditch.

The first question to be determined is the character of the lake. Each party contends that the other has shifted his position in this court from that maintained in the lower court.

What the parties call the lake does not fix its character, but the testimony as to the facts will govern. It is not shown that this lake has ever been used for purposes of navigation, but it is plainly of a size and character which would make it suitable for navigation under our decision in *Kalez v. Spokane Valley Land*

etc. Co., 42 Wash. 43, 84 Pac. 395. Appellants cite *Neterer v. State,* 98 Wash. 635, 168 Pac. 170, but this was a case of a shallow lake clearly unsuitable for navigation.

The lake being navigable, the water between high and low water mark is subject to appropriation. *Kalez v. Spokane Valley Land etc. Co., supra.* We think the trial court was right in decreeing to respondents the prior right to take water from Davis Lake and to use the same for storage purposes, but we think that the decree goes too far. It contains the following:

"Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiffs, Robert Ortel and Mary Ortel, his wife, are the owners by prior appropriation of all the waters of that certain natural lake in Okanogan county, Washington, known as Davis Lake, for stock, irrigation and domestic purposes, and it is further ordered, adjudged and decreed that the plaintiffs are the owners and in possession of the first and prior right to store waters in said Davis Lake from Bear Creek in said Okanogan county up to the ordinary high water mark of said lake.

"And it is further ordered, adjudged and decreed that the defendants nor either of them have any right, title, interest or possession as against these plaintiffs in or to any part or portion of the waters of said lake or the right of storage therein below the ordinary high water mark of said lake."

Respondents did not obtain the absolute ownership of this entire lake by taking a small quantity of the contents thereof or by storing additional water therein. The measure of their rights by appropriation is the amount of water which they have actually taken and put to a beneficial use. The testimony on this point is not very satisfactory, some witnesses claiming an inch and a half per acre is needed, while others testified that one inch is enough. Respondents express an intention to increase the area of their cultivation, but

considering the length of time that they have been upon their land, they should, as against a subsequent appropriator, be limited to water for the land which they now have under cultivation. For this they have at least thirty-one hundredths of a cubic foot at low stage from Bear Creek, and a measurement made by the same engineer at the same time that Bear Creek was measured showed that the respondents were receiving at the lake sixty-six hundredths of a cubic foot per second of time, and an allowance of one cubic foot per second of time from the waters of the lake would be liberal under the testimony in this case.

The question of the rights of storage cannot be definitely fixed under the testimony in this case, but the testimony does show that the level of the lake is lowered and raised from two to six feet, furnishing a supply much greater than could be utilized by the use which respondents have heretofore made of the water. Appellants should be permitted to store water in the lake also, and to take from the same what they put in, after proper allowance for evaporation and seepage, and to take from the lake such portion of any surplus water therein as they need, subject to the condition that there must at all times be reserved a sufficient supply to insure the delivery to respondents of one cubic foot per second of time throughout the irrigation period by the appliances now in use when kept in good working order; and in case either party is dissatisfied with the conditions, the hydraulic engineer should be called upon to determine the proper method of operation under the provisions of § 4, p. 144, of the Laws of 1919. [Rem. Comp. Stat., § 7396.]

It is directed that the decree be modified as herein indicated.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16800. Department One. April 10, 1922.]

WESLEY E. PETERSON *et al.*, *Appellants*, v. W. C. DAWSON & COMPANY, *Respondent*.[1]

MASTER AND SERVANT (110)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECTS. A longshoreman, injured by the fall of ties when a top-heavy tackle load was received in the hold of a ship, is guilty of contributory negligence, where he observed the danger and unnecessarily assumed a dangerous position to release the tackle.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered April 20, 1921, upon granting a nonsuit, dismissing an action for personal injuries sustained by a longshoreman while loading a ship. Affirmed.

P. L. Pendleton, for appellants.

R. S. Holt, for respondent.

BRIDGES, J.—Suit for personal injuries. The plaintiff was a longshoreman of considerable experience. At the time of his injury, he was in the employ of the defendant, which was engaged in loading the steamship "Sudbury", owned by it, with cross-ties. These ties were brought to the ship's tackle on scows. A chain would be stretched out and ties put on it, and then the chain would be drawn up tight and its two ends hooked onto the ring at the end of the ship's tackle, and thus the load would be carried to the deck of the ship and lowered into the hold by means of winches operated on the deck of the vessel. Peterson, with his companions, was at work in the hold of the vessel. It was their duty, as a load of ties would come to them, to remove the chain and attach it to the tackle in order

[1]Reported in 205 Pac. 835.

that it might be returned for another load, and distribute the ties evenly throughout the vessel. Usually the ties were loaded four wide and five high. There were, however, many exceptions to the rule. The particular load which injured Peterson was only two ties wide and seven high, thus making it top-heavy. As this load was being lowered into the ship, Peterson noticed its peculiar defects. He observed just how many ties there were in the load, that it had a base of only two ties and was seven high, and appreciated that there might be some danger of the ties falling when the chain was removed. Two of the workmen held up the pile while Peterson unhooked the chain from the tackle and pulled it out from under the load. He was in the act of hooking the released chain onto the cable when the ties toppled over and injured him.

The trial court granted a nonsuit, and judgment was entered dismissing the action. The plaintiffs have appealed.

We are satisfied the judgment must be sustained. If it be conceded that this load of ties was improperly and dangerously loaded, Peterson knew that fact as well as anyone else. He knew that its base was too narrow and that the pile was too high, and that it was top-heavy and likely to fall. It was his duty to keep these facts in mind while he was removing the chain. In performing that act and attaching the chain to the cable it was not necessary that he be within the reach of danger. The winchman, or some person giving signals to him, was at all times within view of those unloading the ties, and the appellant and his companions had a right, and it was their duty, to give any signals which might be proper or necessary in safely carrying on their work. The appellant knew the ties were liable to fall over, and having that knowledge, it

was not only his privilege but his duty to so direct the winchman that the load could be placed on its side, and thus the chain removed without the slightest danger. It is manifest from a reading of the record that Peterson was guilty of negligence which materially contributed to the injury.

Judgment affirmed.

PARKER, C. J., MITCHELL, and TOLMAN, JJ., concur.

[No. 16895. Department One. April 10, 1922.]

WILLIAM C. KEITH, *Respondent*, v. TSUE CHONG *et al.*, *Appellants*.[1]

BILLS AND NOTES (141)—BONA FIDE PURCHASER—GOOD FAITH—KNOWLEDGE OF DEFECTS—EVIDENCE—SUFFICIENCY. Whether a trade acceptance in consideration of the future delivery of goods was purchased in good faith for value, does not depend so much upon knowledge of circumstances which excite suspicion, as upon the good faith of the purchaser.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 21, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Riddell & Brackett, for appellants.

Poe & Falknor, for respondent.

PER CURIAM.—The foundation of this action is a trade acceptance, which the plaintiff alleged he purchased before maturity in good faith and for a valuable consideration. With the indorsement thereon, it is as follows:

[1]Reported in 205 Pac. 834.

Seattle, Wash., March 12, 1920.

$600.00 35 days after sight pay to the order of OURSELVES SIX HUNDRED.....DOLLARS. The obligation of the acceptor hereof arises out of the purchase of goods from the drawer as per invoice of..... 19....

NORTHWEST M. & GR. CO.
By G. H. DeWolf.

Accepted March 12, 1920.
Payable at First National Bank.
By Tsue Chong
Louis Pond.

(Indorsement on back)
Northwest M. & Gr. Co.
G. H. DeWolf.

The trial court entered findings, conclusions and judgment for the plaintiff. It is stated by the appellants that "the sole question in controversy upon this appeal is whether the court correctly found from the testimony that respondent, Keith, was a purchaser in good faith for value prior to maturity."

It appears from the evidence that, as between the drawer and acceptor of the instrument, it was given in consideration of the future delivery of goods. It also appears that, after the respondent purchased the instrument and prior to its maturity, a portion of the goods were delivered and accepted by the appellants. The remainder of the goods were not delivered by the seller.

Citing the case of *Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846, to the effect that an indorsee who acquires negotiable paper, knowing the promisor is bankrupt, acquires it with notice of its infirmity, reliance is had in this case upon the testimony to the effect that the respondent knew and admitted that the drawer of the present instrument was bankrupt. But an examination of the proof shows he made that admission with reference to a date some two months after he purchased the instrument. His admission was of a date he talked with the deputy prosecuting attorney concerning a

criminal action against DeWolf, which the deputy prosecuting attorney said was about the middle of May, 1920, some two months after the respondent had purchased the paper in question.

But it seems to us to be needless to discuss all of the features and details of the transaction brought out in the evidence and mentioned in the argument. Essentially they are only questions of fact. In this kind of a case it is not so much a question of knowledge on the part of the indorsee of circumstances that excite suspicion, but the test is, did he act in good faith. *Scandinavian-American Bank v. Johnston,* 63 Wash. 187, 115 Pac. 102. Tested by that rule, an examination of the evidence, in the light of the respect accorded the opinion of the judge who tried the case, satisfies us that the judgment should be, and it is hereby, affirmed.

[No. 16770. Department One. April 10, 1922.]

LEON NOBLE *et al., Appellants,* v. FRED J. DIBBLE *et al., Respondents.*[1]

PHYSICIANS AND SURGEONS (2)—LICENSE TO PRACTICE—DENTISTS—STATUTES. The dental practice act, Rem. Code, § 8412 *et seq.*, is constitutional.

COURTS (38)—RULE OF DECISION—FEDERAL DISTRICT COURTS. The supreme court of this state is not bound by the decisions of any Federal court except the supreme court of the United States.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered June 17, 1921, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

J. W. A. Nichols and *Browder Brown,* for appellants.

The Attorney General, for respondents.

[1]Reported in 205 Pac. 1049.

PER CURIAM.—The purpose of this action is to enjoin the state director of licenses and the dental examining board from making examinations for the purpose of permitting persons to practice dentistry in this state, and to prohibit them from issuing any certificates authorizing such practice, and to enjoin the state auditor from issuing warrants to the examining committee in payment for their services, and the state treasurer from paying any such warrants. The complaint alleges that the plaintiffs are practicing dentists and are taxpayers in the state of Washington. They allege that the director of licenses and the dental examining board are proceeding from time to time to make examinations and issue certificates authorizing persons to practice the profession of dentistry in this state, and that in so doing they are acting without any warrant of law and in violation of the rights and privileges of the plaintiffs. A demurrer to the complaint on the various statutory grounds was sustained. The plaintiffs refused to further plead and judgment was entered dismissing the action, from which judgment this appeal is taken.

In this court appellants seem to contend that the action of the lower court was wrong because, first, § 8412 *et seq.*, Rem. Code[1] (P. C. § 1931 *et seq.*), being the statute with reference to the practice of dentistry, is unconstitutional; and second, that the Federal district court, sitting in this state, has held the act to be unconstitutional, and such decision is binding upon this court. The respondents contend that the appellants are not entitled to maintain this action. We will not decide that question, but will assume, for the purpose of this action, that they may maintain it.

On the question of the constitutionality of the dental

[1]NOTE: See Rem. Comp. Stat., § 10030.

practice act, the appellants give no distinct reason for their contention, but support it by and make their argument through the recent case of *Noble v. Douglas,* 274 Fed. 672. In that case Judge Cushman, in an exhaustive and able opinion, concludes that the dentistry act of this state is unconstitutional.

The constitutionality of this act is no longer an open question in this state. In *In re Thompson,* 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149, the validity of this identical act was first raised and we held it to be constitutional. The same question has been before us in a number of other cases, in all of which the constitutionality of the act was affirmed. *State v. Brown,* 37 Wash. 106, 79 Pac. 638; *State v. Sexton,* 37 Wash. 110, 79 Pac. 634; *State ex rel. Thompson v. State Board of Dental Examiners,* 48 Wash. 291, 93 Pac. 515; *State v. Thompson,* 48 Wash. 683, 94 Pac. 667; *State v. Littooy,* 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292; *Brown v. State,* 59 Wash. 195, 109 Pac. 802. We are now willing to abide by the result of those cases.

The appellants argue that the decision in the case of *Noble v. Douglas, supra,* by the Federal district court, is binding upon this court and that we must follow it regardless of our previous decisions. It has most generally been held that the highest court of a state is not bound by the decisions of any Federal court except the supreme court of the United States. Black, Judicial Precedents, pp. 373, 374, 377; *Kenna v. Calumet, Hammond & Southeastern R. Co.,* 206 Ill. App. 17; *Wells v. Western Union Tel. Co.,* 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045; *State v. Intoxicating Liquors,* 95 Maine 140, 49 Atl. 670.

The judgment is affirmed.

[No. 16809. Department Two. April 11, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. FLOYD WHITE, *Appellant*.[1]

NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE. It is not an abuse of discretion to refuse a new trial in filiation proceedings on the ground of newly discovered evidence that the prosecutrix had given the name of another man as father of the child, where it is shown that this was done to shield the defendant.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered April 19, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in proceedings to determine the paternity of a child and for maintenance. Affirmed.

Leon B. Kenworthy, for appellant.

Hardy E. Hamm and *A. F. Appleton*, for respondent.

HOVEY, J.—The appellant was adjudged to be the father of an illegitimate child, in a proceeding brought under the provisions of ch. 203, p. 709, Laws of 1919. [Rem. Comp. Stat., § 1970.] The case was tried to a jury, and the court entered a judgment requiring the payment of certain sums as provided in the act.

No useful purpose will be served by reciting the evidence. It is ample to sustain the judgment rendered.

The question presented on this appeal is the refusal to grant a new trial upon newly discovered evidence.

The parties live in Dayton, and the child was born in Lewiston, Idaho, and after the judgment was rendered, counsel for appellant discovered that the complaining witness had given the name of a man other than the appellant as the father of the child. The

[1]Reported in 205 Pac. 838.

man bearing the other name did not live in Dayton, but had resided for a short time in Walla Walla. The affidavits do not assert that the complaining witness was ever known to be in the company of the other man. Counter affidavits were filed by the state, in one of which the complaining witness says that she adopted the other name for the purpose of shielding the appellant, who was unmarried at the time, and in the hope that appellant would marry her. There are some inconsistencies in her statements which might influence the trial of the action, but the granting of a new trial is so much within the discretion of the trial court that we cannot say that the showing made would justify this court in interfering with the discretion as exercised in this case.

The judgment is affirmed.

PARKER, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 16907. Department Two. April 11, 1922.]

R. L. JORDAN, *Respondent*, v. CHRIS RIEKER *et al.*, *Appellants*.

G. W. BASSETT, *Respondent*, v. CHRIS RIEKER *et al.*, *Appellants*.[1]

EVIDENCE (2) — JUDICIAL NOTICE — COMMON KNOWLEDGE. The courts will take notice that coal oil poured on coals in a kitchen stove may cause an explosion.

NEGLIGENCE (3)—FIRES—EVIDENCE. There is sufficient evidence that defendant's negligence caused an explosion and fire in a garage, where it appears that he was trying an experiment in heating the place by connecting a preheating torch with a stove in an effort to burn oil.

Appeal from a judgment of the superior court for Adams county, Back, J., entered January 8, 1921, upon

[1]Reported in 205 Pac. 1043.

findings in favor of the plaintiffs, in consolidated actions for damages to property by fire, tried to the court. Affirmed.

G. E. Lovell and *E. A. Davis*, for appellants.

Samuel P. Weaver and *Weaver & Boyles*, for respondents.

Hovey, J.—These are consolidated actions wherein the respondents recovered judgments for the value of their respective automobiles, destroyed by fire in a garage belonging to the appellants.

The fire occurred about nine o'clock in the morning on December 9, 1919. The weather was very cold and the building was heated by two stoves, one in the front part and one in the back part, which was partitioned off as a workshop. The fire started in or about the stove in the rear. The stove was being heated with coal and, according to the testimony, the fire was low and consisted only of coals, some of the witnesses saying the coals were red hot, and another one that they were pretty well burned out.

The manager of this garage, Judisch, shortly before the fire, made the statement, according to several witnesses, that he was going to try an experiment and burn oil instead of coal. It is undisputed that he caused a welding tank to be rigged up with a length of hose, attached at one end to the tank and the other end to an iron pipe which had at its other end a preheating torch such as is used for welding, and this preheating torch was in the stove when the fire started. The tank was connected up with the air pressure system of the garage. Although there is some dispute as to whether it had been made to work perfectly at the time of the fire, it is fair to assume from the testimony that it was working. The tank was supposed to

be emptied of fuel when fitted up, but Judisch told one of the employees to get a can and put oil in it. It is disputed that there was oil in it at the time of the fire, but as considerable time elapsed between the time the employee started to get the oil and the explosion, and he only had to go across the room, it is fair to assume that he put the oil in there.

The only direct testimony as to the starting of the fire is that there was first smoke and then flame from the stove door, and it is undisputed that this flame soon spread itself the full length of the building, probably being carried by the gas which accumulated there from the automobiles, of which a good many were stored in the building.

The explanation of Judisch is that he put the preheating device in the stove merely to get it hot, and that he was then going to keep it outside in the room with the oil burning, and that the heat from this torch would supplement the heat from the stove, and that they found in the summertime that the torch made an unpleasant amount of heat and he thought they would utilize it in cold weather. As against this explanation is his statement that he was going to try an *experiment*. The use which he suggested would not be an experiment, but something that he well understood. One witness testified that, a few minutes after the fire started, Judisch exclaimed: "My God, what have I done?," and that the shop foreman said to him: "Don't whimper how the fire started."

Certain experts were called for the appellants, who testified that the valves of the tank could be left open and the fuel be allowed to run on a fire without danger, but the court can take judicial knowledge of what happens when coal oil is poured on the coals in the kitchen stove. Unless there is a flame, gas generates.

While in this case the evidence is to the effect that no one heard any explosion, the explosion necessary to start this fire need not have been loud enough to be heard by the employees, none of whom seemed to have been right at the stove when the fire started.

Appellants severely attack the judgments of the trial court as not justified by the testimony, but we believe there was sufficient to establish liability. We consider the following cases in point: *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016; *Wodnik v. Luna Park Amusement Co.*, 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070.

The judgments are affirmed.

PARKER, C. J., and MAIN, J., concur.

HOLCOMB, J., concurs in the result.

MACKINTOSH, J., concurs with HOLCOMB, J.

[No. 16447. Department Two. April 11, 1922.]

C. T. STAGER, *Appellant*, v. BURBANK COMPANY *et al.*, *Respondents.*[1]

FRAUD (22)—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. The purchaser of arid land to be irrigated and the water rights, through false representation as to the situation of the land, is entitled to recover his damages, where the land could not be irrigated by gravity flow from the canal.

Appeal from a judgment of the superior court for Walla Walla county, McCroskey, J., entered December 17, 1920, in favor of the defendants, dismissing an action for fraud, tried to the court. Reversed.

Chas. W. Johnson, for appellant.

Sharpstein, Smith & Sharpstein, for respondents.

[1]Reported in 205 Pac. 853.

HOVEY, J.—Appellant sues for damages for fraud arising from the purchase of forty acres of land, and for the cancellation of certain notes and a mortgage given to secure the payment of a portion of the purchase price of the land and the purchase price of a water right.

Appellant resided in the state of Iowa and was one of a party of land purchasers who dealt with Daniel Hayes Company, a corporation with offices in Chicago, but operating in this state. The Burbank Company, of which respondent Pingry is now receiver, owned an irrigation project in the county of Walla Walla, and it entered into an arrangement with Hayes Company to make sales of the land and water rights within the project. The Hayes Company undertook to operate the land which they persuaded the purchasers to buy, for a period of five years, under a division of profits and sharing of expenses, and obtained from the purchaser in this case a cash payment of $1,000 on account of the first year's operation. In January, 1918, an agent for Hayes Company brought the appellant, with other purchasers, to the city of Walla Walla, and while appellant was there he inspected the land and obtained his deed for forty acres of land, the purchase price of which was to be $4,000. Of this sum he paid $2,000 in cash. Appellant also entered into a contract for the purchase of water in a total sum of $3,250, and for this sum, added to the $2,000 unpaid on the land purchased, appellant gave notes secured by a mortgage upon the land. Appellant returned to Iowa and did not attempt to do anything with the land until April, 1919.

In the fall of 1918, Pingry, who was then an officer in the Burbank Company, discovered that there was a good deal of dissatisfaction with the contracts Hayes

Company had made, and went east and secured a refund from Hayes Company of the $1,000 which appellant had advanced to them, and at that time offered to take back the land and return appellant the money which he had paid and cancel his obligation, but appellant said that he wished to go through with the deal.

The grounds of recovery are that the land was very rocky and unsuitable for the farming purposes represented, and that it is too high to receive water by gravity flow from the canal of the company. The trial court dismissed the action.

So far as the misrepresentations as to the character of the land are involved, we agree with the trial court that the appellant would not be entitled to recover. We cannot accept the view, however, that the situation of the land with reference to its water supply should leave appellant without remedy. The great weight of the evidence is to the effect that the land cannot be irrigated by gravity flow from the canal, and that appellant had no knowledge of this fact, nor anything to put him upon inquiry, until shortly before he brought this action. In an irrigated district the water supply is the most important feature to be considered. The testimony shows, without conflict, that the land without the water supply is worth from $15 to $25 per acre, while the purchase price, exclusive of the sum to be paid for the water right, was $100 per acre. Giving the testimony in favor of the respondents the most liberal interpretation, we think appellant established a right of recovery for the sum of $1,000 which he paid in cash, over and above $1,000 which he admits to be the value of the land without the water right, and for the cancellation of his obligations, or for judgment for the amount thereof in case surrender is not secured.

It appears from the testimony that the property of

respondent is being taken over by an irrigation district, and for the purpose of clearing the record the judgment should cancel the water contract made by the Burbank Company with the appellant, upon the cancellation of the obligations given therefor.

The cause is reversed for proceedings consistent with this opinion.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16885. Department Two. April 11, 1922.]

W. G. MUCKLE, *Respondent,* v. LOUIS HOFFMAN, *Appellant.*[1]

FRAUDS, STATUTE OF (42)—OPERATION AND EFFECT—PART PERFORMANCE. One who in good faith goes into the possession of land under an oral contract to purchase, and incurs expense in reliance on the contract, may recover as damages, the value of the work done.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered January 11, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Chas. W. Johnson, for appellant.

MACKINTOSH, J.—A reading of the testimony in this case shows that the evidence preponderates in favor of the following findings of fact made by the trial judge:

"That in the summer of 1919, the plaintiff and defendant made and entered into an oral agreement whereby the defendant agreed to sell to the plaintiff for $1,000 a quarter section of wheat land in Franklin county, Washington; that no written contract was

[1]Reported in 205 Pac. 1048.

made by the said parties, but that the said parties agreed that they would, at some later date, go to the town of Connell, and have a written contract prepared and would sign the same, and that under the said contract the plaintiff would agree to pay and would pay to the defendant the sum of $500 on the 1st day of October, 1919, and the remaining sum of $500 at a later date. That before the 1st day of October, 1919, the plaintiff asked of the defendant and was granted by the defendant an additional time until the 1st of December, 1919, for the making of the first payment.

"That the plaintiff relied upon the said oral agreement and went into possession of the said premises and did work thereon in the summer of 1919, by plowing and weeding the same and preparing the same to be seeded to wheat, which said seeding was to be done in the spring of 1920, that the doing of said work by the plaintiff was with the knowledge and express consent and approval of the defendant.

"That after the said labor and services had been performed by the plaintiff, the defendant refused to execute or deliver to the plaintiff the contract for the sale of the said premises and refused at all times to pay the plaintiff for the said labor and services, and still refuses so to do.

"That the defendant received the benefit of the labor and services so performed by the plaintiff and has been benefited thereby . . ."

Upon these findings, judgment for $340 was entered for the respondent, from which this appeal has been taken.

It has been the contention of the appellant throughout the progress of this case that the respondent's action could not be maintained for the reason that the oral contract between the parties fell within the statute of frauds. This action is not one seeking to enforce the oral contract, but to recover the value of the labor which the respondent performed under the contract to the benefit of the appellant, which was obtained by the appellant's wrongful act.

This court, in *Johnson v. Upper,* 38 Wash. 693, 80 Pac. 801, refused to allow damages for loss of profits for the breach of an oral contract falling within the statute of frauds, but recognized the rule that, where there has been a part performance in good faith by the plaintiff of the contract entered into, and the performance was made in reliance upon the contract and in pursuit of it, and the refusal on the part of the defendant would result in fraud, injustice or oppression, an action for the value of the work done in compliance with the contract and in execution of it could be maintained against the defendant, upon the equitable doctrines of fraud and estoppel, for the reason that " 'the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.' "

The court said further in that case:

"If appellant had sustained any damages by reason of improvements, or money expended, or altered condition of the parties, or time spent or labor performed, such damages, no doubt, would have been alleged,"

the court in effect holding that, had there been such an allegation in that case, the complaint would have stated a cause of action.

It is further urged by the appellant that the respondent is not entitled to recover for the reason that he was the one who had first breached the contract, and cites the case of *Johnson v. Puget Mill Co.,* 28 Wash. 515, 68 Pac. 867. The evidence, however, does not establish this fact, but, on the contrary, establishes that the initial breach was by the appellant.

For the reasons stated, the judgment is affirmed.

PARKER, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 16965. Department Two. April 11, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY DUDMAN, *Appellant*.[1]

EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution for the embezzlement of a certificate for one thousand shares of stock, intrusted by A. to the defendant as agent for sale, in which defendant admitted the sale of one thousand shares to W. claiming it was not A.'s stock but part of his own, entries in the corporate stock books are admissible showing the cancellation of A.'s certificate at the time in question, and the reissue, in lieu thereof, of a certificate to W. for one thousand shares; in view of Rem. Comp. Stat., §§ 3693, 3827 requiring a corporate record of all certificates showing date, number and to whom issued and transferred, and Id., § 3829, making it a misdemeanor to make any false entry in such record.

SAME (3)—ELEMENTS OF OFFENSE—BY AGENTS. Where an agent was intrusted with a certificate of stock for sale in July, and on the following January sold it and refused to account for the proceeds, he is guilty of larceny, under subdiv. 3, of Rem. Code, § 2601, making it larceny for an agent or bailee, intrusted with the possession of property, to appropriate the same to his own use.

CRIMINAL LAW (347)—NEW TRIAL—PREJUDICE OF JUROR. It is not an abuse of discretion to refuse a new trial on account of the prejudice of one juror, where the motion was supported by hearsay affidavit for appellant's attorney and denied by the hearsay affidavit of the prosecuting attorney.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered August 9, 1921, upon a trial and conviction of grand larceny. Affirmed.

G. E. Lovell and *E. A. Davis*, for appellant.

W. O. Miller, for respondent.

HOLCOMB, J.—Appellant was accused and convicted of the crime of grand larceny. The information alleged that he held 1,000 shares of the capital stock of the Bethlehem Gold Mines, Limited, a corporation, in his

[1]Reported in 205 Pac. 848.

possession, custody and control, as agent of one W. S. Egbers, and being then and there authorized by Egbers, the owner thereof, to sell the 1,000 shares, and to account to Egbers for the proceeds thereof, sold the same for the sum of $500, or thereabouts, and did then and there wilfully and feloniously, and with intent to defraud Egbers of the proceeds of the sale of the stock, withhold and appropriate the proceeds of the sale thereof to his own use.

The statute under which the prosecution is brought is as follows:

"Every person who, with intent to deprive or defraud the owner thereof— . . .

"(3) Having any property in his possession, custody or control, as . . . agent, . . . of any person, . . . shall secrete, withhold or appropriate the same to his own use . . .

"Steals such property and shall be guilty of larceny." Rem. Code, § 2601 (P. C. § 8944).

Appellant complains of the refusal of the court to dismiss the defendant at the end of plaintiff's case, and refusal to dismiss him at the conclusion of the case, and refusal to grant a new trial.

Appellant contends that there is absolutely no evidence that he committed the acts complained of in the information, and that the acts proven by the prosecution do not constitute a crime.

In July, 1919, Egbers left with appellant one certificate of stock, originally issued to one John Armstrong, for 1,000 shares of the capital stock of the Bethlehem Gold Mines, Limited, which had been purchased by Egbers and indorsed in blank by Armstrong. The agreement was that appellant was to sell this stock and account to Egbers for the proceeds of such sale. In January, 1920, appellant sold to Jake Wacker one thousand shares of the capital stock of the Bethlehem

Gold Mines, Limited, receiving therefor the sum of $500. The proceeds thereof were immediately deposited in the Pioneer National Bank of Ritzville, Washington, and immediately withdrawn upon checks issued by appellant. The date of the sale of the stock to Wacker was January 2, 1920, and on January 6, 1920, a certificate for 1,000 shares of the capital stock of the company was issued by appellant, as president, and G. T. Van Dusen, as secretary of the company, and by appellant sent by mail to Wacker. On May 27, 1919, a certificate numbered 627 had been issued to John Armstrong of Ritzville, Washington, as shown by the register of stock kept by Van Dusen as secretary of the corporation. The same register shows that, on January 6, 1920, a certificate numbered 953 was issued in lieu of the certificate numbered 627 previously held by John Armstrong for 1,000 shares. The register also shows that, on January 6, 1920, certificate No. 953 was issued for 1,000 shares of the capital stock of the company to Jake Wacker, Jr., of Odessa. Another page of the register contains a list of the stockholders of the company, and shows 1,000 shares of stock in the name of John Armstrong. In another column, under the heading "To Whom Transferred," appears the name of "Jake Wacker, Jr., address Odessa," and under the heading "Date of Transfer," appears the date "1/6/20." Under the heading "Shares transferred" the number "1,000" appears, and under the heading "Number of new certificate," "No. 953." These stock entries show apparently a complete record of the stock originally issued to Armstrong, except that they do not show the transfer by Armstrong to Egbers.

Appellant contends that the entries from the stock book are not competent evidence against him, and tes-

tified that he knew nothing of the entries being made therein at the time they were made, and not until long afterwards. The testimony on behalf of appellant was to the effect that he was the selling agent of the company; that he had in his own name some 300,000 shares of the company's stock, and in addition thereto there was a credit due him on the books of the company amounting to some $40,000, which he had advanced to and for the company. Appellant would write to Van Dusen, the secretary, and tell him to issue a stock certificate to a certain person; in this case to Wacker. At the end of the month appellant would send in some of his certificates, Van Dusen would cancel these certificates and cover the certificates already issued by certificates of like amounts among those sent in by appellant. Thus, it is contended, if appellant made sales of various amounts, among them a 1,000-share sale, at the end of the month he would send in certificates of various amounts, among them a 1,000-share certificate, and under the heading "To Whom Transferred", Van Dusen would put in any 1,000-share certificate he desired, irrespective of whether it stood in the name of one man or that of another. If appellant sent in no certificates, Van Dusen would issue treasury stock and charge the same up to appellant on his open account. Van Dusen testified that he never notified appellant that the Wacker stock was covered by the Armstrong stock, and that appellant never saw the books and knew nothing of Van Dusen's method of keeping the books. On the contrary, appellant testified that he knew in a general way how Van Dusen kept the books, and approved of it.

The entries on the stock register, however, are inconsistent with appellant's and Van Dusen's explanation. Appellant sold 1,000 shares to Wacker on Janu-

ary 2, completed the financial transaction at a bank in Odessa, Washington, on January 4th or 5th, received the money therefor, and had it transferred to the Pioneer National Bank of Ritzville on the same day, and on the next day, not at the end of the month, the entry was made in the stock register in the general office of the company at Spokane, by Van Dusen, the secretary, that 1,000 shares of stock standing in the name of Armstrong had been transferred to the name of Jake Wacker, Jr. The certificate number of the Armstrong stock was cancelled, and a certificate with a new number issued to Wacker. This would certainly indicate that Armstrong's stock was intrusted to appellant by Egbers after he acquired it, and was sold by appellant to Wacker and returned by appellant to the office of the company, cancelled, and a new stock certificate issued in the name of Wacker.

Appellant contends that Van Dusen's method of showing the stock transfers was nothing but a matter of bookkeeping followed of his own accord; but this cannot be sustained. The statutes governing private corporations in this state provide: first, that the stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no stock transfer shall be valid, except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties by and to whom transferred, the numbers and designation of the shares, and the date of the transfer (Rem. Code, § 3693 [P. C. § 4520]); second, that it shall be the duty of the trustees of every company incorporated to keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and show the number of shares of stock held by them respectively,

and the time when they became the owners of such shares, etc. (Rem. Code, § 3701 [P. C. § 4527]); and third, if at any time the clerk or other officer having charge of such book shall make any false entries or neglect to make any proper entry therein, etc., he shall be deemed guilty of a misdemeanor, etc. (Rem. Code, § 3703 [P. C. § 4513]). [Rem. Comp. Stat., §§ 3693-3827, 3829.]

Notwithstanding Van Dusen's attempted falsification of the record in his testimony, it must be assumed that he was attempting to comply with the law regarding the record of stock issued and transferred, and also that appellant, having full charge of the corporation as president, and of its promotion, knew the law, made at least some effort to comply with it, so that he and all others would know who were stockholders, when they became such, who had ceased to be stockholders, and when and how. The records, therefore, under the statute, were competent evidence, and the jury were justified in disbelieving appellant and Van Dusen, and believing the record.

It is argued that appellant is not bound to keep the identical shares of stock on hand, but could replace the shares intrusted to him by Egbers with other treasury stock, and that he had plenty of such stock with which to replace the stock received from Egbers, and had offered to replace the same with 1,000 shares of treasury stock. Thompson on Corporations, vol. 4, § 4235, is cited to the effect that a *pledgee* generally is not bound to keep the identical shares on hand. Under the evidence and information in this case, appellant was not a pledgee, but was an agent or bailee, and as such the statute under which the prosecution was instituted applies.

"One who sells property as an agent, and who subsequently conceives an intent to and does misappro-

priate the proceeds, embezzles the proceeds, and not the property." (*Henderson v. State,* 55 Tex. Cr. 640, 117 S. W. 825.)

A somewhat similar case in our own court is that of *State v. Campbell,* 99 Wash. 502, 164 Pac. 968, where the defendant was given a note and mortgage for collection. He sold the note and mortgage and failed to account for the proceeds. He claimed he purchased the note and mortgage from the holder thereof, and that the relation of debtor and creditor, instead of principal and agent, existed between them. The jury found that the relation of principal and agent existed between the parties, and the defendant was convicted, and appealed. In reviewing that case we said:

"The evil at which the statute defining larceny by embezzlement is leveled is not confined to instances where the agency involved is of long duration or is broad and comprehensive in scope. If, at the time of the felonious and fraudulent conversion, the accused was an agent for a particular purpose only, and the property appropriated was intrusted to him by virtue of such agency, it is sufficient. It is not the nature and extent of the authority conferred, but the fact of the relationship which constitutes an essential element of the crime. If the note and mortgage were delivered to appellant for collection, there can be no question but that he was an agent within the meaning of the statute."

So in this case, if the Armstrong certificate for 1,000 shares of stock was intrusted to appellant for sale, he to account for its proceeds to the then owner thereof, as found to be the fact by the jury, then appellant was guilty if he failed or refused to so account for the proceeds after the sale.

It is also claimed that a new trial should have been granted to appellant by reason of bias and prejudice of one juror. The hearsay affidavit of the attorney for

appellant as to the bias and prejudice of the juror is denied by the hearsay affidavit of the prosecuting attorney, and the court was satisfied that there had been no bias and prejudice on the part of the juror and denied the motion for a new trial.

We certainly cannot say that he thereby abused his discretion. The case was submitted to the jury upon fair, concise and lucid instructions, and no exception was taken to such instructions.

We can find no error in the record, and the judgment is affirmed.

PARKER, C. J., MAIN, HOVEY, and MACKINTOSH, JJ., concur.

[No. 16830. Department One. April 11, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES HART, *Appellant*.[1]

CRIMINAL LAW (226)—INDICTMENT AND INFORMATION (95)—ELECTION BETWEEN ACTS—ISSUES, PROOF AND VARIANCE—TIME OF OFFENSE. In a prosecution for statutory rape by sexual intercourse on four alleged occasions, in which the defense is an alibi on the date relied upon, the state's election makes the date material, notwithstanding Rem. Code, § 2060, providing that it is not essential to prove an offense on the exact date charged.

CRIMINAL LAW (226)—ELECTION BETWEEN ACTS. In such a case, defendant's admission of an attempt to commit the offense, without fixing the time and place, does not warrant the submission of an instruction on the offense of attempting to rape, when there was no evidence of any act on the day charged.

Appeal from a judgment of the superior court for King county, Card, J., entered April 13, 1921, upon conviction of attempted carnal knowledge of a child. Reversed.

[1]Reported in 205 Pac. 836.

Albert D. Martin and *Wm. R. Bell*, for appellant.
Malcolm Douglas and *Bert C. Ross*, for respondent.

MITCHELL, J.—The appellant was charged by an information with the crime of carnal knowledge of a female child not his wife. He was by a jury found guilty of attempted carnal knowledge of the girl, and has appealed.

We shall notice only two assignments of error: (1) The giving of an instruction; and (2) the denial of a motion for a new trial.

The prosecuting witness testified that the appellant had sexual intercourse with her on four occasions: About March 12, 1920; March 19, 1920; April 20 to 25, 1920; and June 7, 1920. The acts occurred at different places, the last one at 3410 Albion Place, Seattle. It appears that she testified fully and frankly that each transaction was a completed act. She did not mention any other occasion, nor did she testify that he attempted to have sexual intercourse with her at any time that he did not fully accomplish his purpose. Another witness for the state, one Harry A. Cook, testified that, after the appellant was apprehended, he was present at an office at the police headquarters building when a representative of the prosecuting attorney's office questioned the appellant concerning the complaint against him, and that the appellant denied the accusation, but later admitted he had attempted sexual intercourse with the girl. At the close of the state's case, upon motion of counsel for the appellant, the state elected to stand upon the act testified to have occurred on June 7.

The defense was a denial of any improper relations with the prosecutrix, and an alibi. There was an abundance of evidence to support the alibi, but it, of course, was a matter for the jury.

After instructing the jury generally, including the law upon the subject of the crime charged, the court submitted to them the lesser offense of attempt to commit the crime charged. The instruction was as follows:

"An act done with intent to commit a crime and tending, but failing, to accomplish it, is an attempt to commit that crime. Every person who shall do any act with intent to commit the crime of carnal knowledge of a child, and tending, but failing to accomplish it, shall be guilty of the crime of attempted carnal knowledge of a child."

The giving of this instruction, duly excepted to, is one of the errors assigned. Certainly there is no testimony in the case showing anything but completed acts of sexual relations, other than the testimony of Harry A. Cook; and his testimony as to the admission made by the appellant does not invest that admission with the remotest idea of either place or time. If the testimony had been that the appellant had admitted he made an attempt on June 7, 1920, or at the place the girl testified the completed act, relied on by the state, took place, the instruction would be differently circumstanced; but, as the case was made, the state having elected to stand upon that date as the time of the offense for which a conviction was asked, and she having testified as to the place, the instruction was erroneous.

Section 2060, Rem. Code (P. C. § 9273), provides that the precise time when the crime was committed need not be stated, but it may be alleged to have been committed at any time before the date of the signing of the indictment or filing of the information and within the time an action may be commenced therefor. But there is the added qualification contained in the section of an exception where the time is a material

ingredient. However, the proposition presented in this case is one of proof and not of pleading. It is a question of proof in a case where the defense is a general denial supplemented by that of an alibi, which is always a proper procedure under the general issue of "not guilty." In the case of *State v. Moss*, 73 Wash. 430, 131 Pac. 1132, which was a prosecution for adultery, wherein a number of acts were shown and wherein there was no defense of alibi, the court, after finding there had been, in legal effect, an election by the state to rely on a particular act for a conviction, said:

"While under Rem. & Bal. Code, § 2060, the precise time at which the crime was committed need not be stated in the indictment or information, but may be placed at any time prior to the finding of the indictment or filing of the information within the time in which the action may be commenced, and while this latitude is usually allowable both in allegation and proof, still when an election is made, on proof of several acts, to rely upon an act committed at a specific time, the accused can only be convicted of the specific act constituting the offense committed at about that time and intended to be so designated and distinguished from other acts in evidence."

The case of *State v. King*, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322, is in point. The defendant had been convicted of the crime of obtaining money under false pretenses. The defense was an alibi. The jury were instructed:

" 'I will say in that connection that the exact date is immaterial. It does not make any difference so far as the crime is concerned if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed, . . .' "

Upon holding the instruction to be misleading and erroneous, it was said:

"The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of February, 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi."

The case of *State v. Morden,* 87 Wash. 465, 151 Pac. 832, is to the same effect. It was a case of rape, in which the prosecuting witness definitely fixed the exact date of the offense on a day when she was working for the defendant on his premises, and the defendant undertook to establish an alibi for the prosecutrix by showing she was not working for the defendant, nor on his premises, on that day. The jury were instructed that the date charged was not a material allegation and that it was enough for the state to prove any other day on or about that date, within three years. This court held the instruction was wrong and reversible. It was said:

"The time charged was, therefore, as clearly material as it would have been had the defense been an alibi."

The case of *State v. King, supra,* was relied on, and, continuing, it was said:

"In all reason, as it seems to us, it is just as difficult to imagine a case where the defense is that the

victim of a personal assault was not present at the time and place when the assault must have been committed, if at all, in which the time of the commission of the offense would not be material to such a defense. While under the statute, Rem. & Bal. Code, § 2060 (P. C. 135 § 1025), it is not essential that the precise time of the offense charged be alleged in the indictment or information, the question here presented is not one of allegation, but of proof and of the necessity for an instruction applicable to the proof."

It would be entirely irregular and without reason to say the rule is applicable to the offense charged and not applicable to the crime of an attempt to commit that offense. The effect of an election on the part of the state is to waive, as a basis upon which a conviction shall primarily rest, all other similar acts disclosed by the proof. It must be held that it likewise effectuates a waiver of any and all proof of an attempt to commit the crime charged, unless such proof tends to show that the attempt occurred on the day specified in the state's election. There was no such proof in this case, and hence the instruction complained of should not have been given. The motion for a new trial should have been granted.

Our conclusion does away with any necessity to discuss other assignments of error.

Reversed and remanded with directions to grant a new trial.

PARKER, C. J., TOLMAN, and BRIDGES, JJ., concur.

[No. 16802. *En Banc.* April 12, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Alfred Anderson, Plaintiff*, v. A. L. CALLAHAN, *as Sheriff of Whatcom County, Respondent.*[1]

CRIMINAL LAW (399)—INDICTMENT AND INFORMATION (87)—DEMURRER — OPERATION AND EFFECT OF ORDER SUSTAINING — APPEAL—SUPERSEDEAS. Upon the state's appeal from an order sustaining (with leave to amend) a demurrer to an information for first degree murder, a non-bailable offense, the accused is not entitled to a discharge, where the information did not contain matter constituting a defense or bar; as the case comes within Rem. Code, § 2103, providing that if a case be resubmitted, the defendant, if in custody, must remain so, unless bailed; in view of § 2106, providing that the order is final only if the information contains matter which is a legal defense or bar, and § 2313, providing for a discharge only in case the case is dismissed, and of §§ 1075 and 1076 prohibiting a discharge from a judicial commitment if the term has not expired, or for any defect or want of probable cause, except upon investigation upon which the prisoner may be recommitted or admitted to bail.

INDICTMENT AND INFORMATION (87)—HABEAS CORPUS (15, 24)—DISCHARGE—POWER OF COURT. In habeas corpus proceedings to release accused, held in custody under a warrant for a non-bailable offense, the information does not become *functus officio* by the sustaining of a demurrer, with leave to amend, in view of the fact that our statutory provisions do not contemplate a discharge until the case is dismissed, and of the inherent power of the court to commit persons judicially before them, and in view of Rem. Code, § 2103, providing that, if the case be resubmitted a defendant in custody shall remain so.

CRIMINAL LAW (188)—TIME FOR TRIAL—DISCHARGE FOR DELAY—WAIVER. Upon the state's appeal from an order sustaining a demurrer to an information with leave to amend, the accused waives the statute requiring that he be brought to trial within sixty days, and cannot complain of a denial of a speedy trial guaranteed by Const., art. 1, § 21, where he failed to apply for a trial within sixty days, but only demanded his discharge.

PARKER, C. J., dissents.

[1]Reported in 206 Pac. 13.

Application filed in the supreme court September 26, 1921, for a writ of *habeas corpus* to release a person held in custody upon a charge of murder. Denied.

Sather & Livesey and *Harry C. Barney,* for relator.

Loomis Baldrey, for respondent.

HOLCOMB, J.—This is an original application for a writ of *habeas corpus.*

The relator is restrained of his liberty in the county jail of Whatcom county, pursuant to a warrant of arrest based upon information charging him with the crime of murder in the first degree, alleged to have been committed July 28, 1921. He has been in custody in jail since that date.

A demurrer to the information was filed by him, and submitted to the trial court on August 18, 1921, and a decision rendered thereon August 26, the order on which was as follows:

"On this 26th day of August, 1921, this cause came regularly on for hearing by the court on demurrer, and after hearing said demurrer and the argument of counsel, and the court being fully advised in the premises, it is by the court ordered that the said demurrer be and the same is hereby sustained, and the prosecuting attorney is hereby permitted to file a new information, to which the state excepts, and its exception is noted."

The prosecuting attorney elected to stand upon the information and appeals from the order sustaining the demurrer.

Relator contends that, having elected to stand upon the information and appeal from the order, the order has become final, and the prisoner is entitled to his discharge. Bishop's New Criminal Procedure (4th ed.), vol. 1, p. 460, is quoted as follows:

"When the judgment is for defendant, on demurrer to the indictment, the judgment is 'that he be dismissed and discharged from the premises.'"

It is therefore insisted that the order having become final, the judgment of the court to the effect that the prisoner was being held on a defective information entitled him to his liberty, since the state elected to appeal. It is admitted, however, that the lower court had a right to refrain from discharging relator from custody until the state had an opportunity to file a new and proper information.

Respondent and the prosecuting attorney rely upon the statute, Rem. Code, § 1716, subd. 7 (P. C. § 7290), which reads as follows:

"But an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits."

Against this relator urges that no provision is found in our criminal code, nor in the statutes on appeal, which provides for a stay of judgment in the lower court in a criminal case upon appeal by the state, and cites *State v. Fenton,* 30 Wash. 325, 70 Pac. 741, and *State ex rel. Shattuck v. French,* 82 Wash. 330, 144 Pac. 28, where we held in effect that the statutory provisions for a stay in either a civil or criminal action are found in the statutes, and neither contemplate a stay in a case of this kind. See, also, *State v. Miller,* 72 Wash. 154, 129 Pac. 1110; *State v. Poole,* 64 Wash. 47, 116 Pac. 468. In the *Shattuck* case, *supra,* this language is used:

"The legislature, by its failure to provide for a stay of the order discharging a prisoner in any case on an

appeal by the state, has, in effect, declared the remedy by appeal an adequate remedy notwithstanding the prisoner's release. If we entertain the writ of review in this case on the ground of inadequacy of the state's remedy by appeal, then we must, for the same reason, entertain it in every case where a prisoner is discharged on demurrer to an information, or for lack of jurisdiction, or for any other reason involving 'material error in law not affecting the acquittal of a prisoner on the merits.' The legislature, by giving the right of appeal in all such cases, must be presumed to have considered that remedy adequate in at least some case to which it would apply."

It will be observed that the language used in that case was used with reference to the adequacy of the state's remedy by appeal in such a case, and not particularly to the prisoner's right to release. That case was one where the prisoner had not been brought to trial within the statutory period of sixty days after the filing of the charge against him, and the trial court had decided that the prisoner should be released for the reason that the crime charged was a misdemeanor, and the prisoner had been confined in jail for more than sixty days, and that the state was barred by statute from any further prosecution for the same offense.

Section 2103, Rem. Code (P. C. § 9156), provides:

"If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information."

Section 2310, Rem. Code (P. C. § 9141), provides:

"Every person charged with an offense, except that of murder in the first degree, where the proof is evi-

dent or the presumption great, may be bailed by sufficient sureties, . . ."

Upon an application by relator to be admitted to bail in the court below, the trial court refused to admit him to bail, stating, as shown in the return to the writ herein, that the accused failed to show that the crime charged comes within the provisions of the statute, being § 2310, Rem. Code (P. C. § 9141).

The effect of the court's order was to resubmit the case as provided in Rem. Code, § 2103.

Section 2106, Rem. Code (P. C. § 9159), provides:

"If the demurrer is sustained because the indictment or information contains matter which is a legal defense or bar to the action, the judgment shall be final, and the defendant must be discharged."

But the trial court specifically stated, as shown in the answer of respondent to relator's supplemental petition, filed herein, that the demurrer was not sustained upon that ground, but was sustained upon the ground that the information does not substantially conform to the requirements of the code; or that more than one crime is charged under the provisions of § 2105, Rem. Code (P. C. § 9158).

The trial court, at the hearing on the application to discharge the prisoner, suggested that the appeal was premature and without right, and that the accused should move in this court to dismiss the appeal. Relator also alleged in his original petition that the appeal was premature and without right; and it may be that it is, since there has been no final judgment of dismissal granted in the case and nothing but an order sustaining the demurrer to the information. That matter, however, is not for us to decide at this time.

The simple situation here is that the trial court has ordered the resubmission of the case upon another

information. Meantime the relator is being held under a warrant issued under an information the validity of which has not yet been finally tested; and the statute heretofore quoted requires that the accused, being in custody and not for a *prima facie* bailable offense, must so remain unless he be admitted to bail upon a proper showing.

The judges of the superior court are among the conservators of the peace. They may commit persons before them when the occasion for it judicially appears. Without the aid of statute, our judges have the same statutory authority over this matter as the English. It was so held by Chief Justice Marshall in *United States v. Burr,* 1 Burr's Trial, 79 (Fed. Cas. No. 14,692b). Bishop's New Criminal Procedure, § 229.

Our criminal code does not contemplate the discharge of a defendant in a criminal prosecution unless the prosecution is to be dismissed.

Section 2313, Rem. Code (P. C. § 9144), reads as follows:

"Whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail shall be exonerated, . . ."

In *In re Graves,* 61 Ala. 381, in a hearing upon an application for mandamus to compel the lower court to discharge a prisoner, the relief was denied, and the court said:

"We can not assent to the proposition, that whenever a demurrer is sustained to an indictment, or it is quashed or otherwise vacated, the person against whom it was preferred is, in every such case, to be discharged. The presentment of a grand jury is always sufficient authority for the issue of a *capias* or warrant of arrest for the person accused, and for detaining him in custody, if not enlarged upon bail, to answer

for the offense charged. The law, upon such a finding of the grand jury, makes it the duty of a court to hold him for trial upon the indictment. . . . When the indictment is quashed for a reason not touching the question of their guilt or innocence, they cannot be considered as vindicated; nor is the effect of the presentment of the grand jury so destroyed, that, looking both to the safety of the public and the rights of individuals, it would be unjust to hold persons so accused of crime, bound to appear to answer another indictment therefor, free from the defects of the first. This is implied, indeed, by the provision of the statute, that the court may in such a case 'order another indictment to be preferred for the offense charged or intended to be charged,' either 'at the same or a subsequent term.' The authority to refer the matter again to a grand jury, imports that although the instrument quashed be vacated as an indictment, it may be good as an affidavit or report of the grand jury that the party accused had committed the offense with which he is charged. By declaring the power in a court to require inquisition by another grand jury, the statute recognizes it as possessing the corresponding authority of holding the supposed culprit to answer to their presentment."

In *Gooden v. State,* 35 Ala. 430, a prosecution was standing on a change of venue for a crime committed in Randolph county to Talladega county. Judgment was arrested for defects in the indictment and a voluntary dismissal entered. Thereupon the court bound the accused by recognizance for his appearance to answer another indictment to be preferred against him for the same offense at the next term of the circuit court of Randolph county. The supreme court, on appeal, said:

"Independent of statute, the circuit courts possess the undoubted power, where the judgment in a criminal case is arrested, and a *nolle prosequi* is entered by the State, to bind the defendant over to appear at the

circuit court of the proper county to answer a new indictment for the same offense."

See, also, *Crumpton & Walker v. State,* 43 Ala. 31; 2 Wharton's Criminal Procedure, § 1320; *State v. Newkirk,* 49 Mo. 472; *State v. Peck,* 51 Mo. 111; *State v. Cunningham,* 51 Mo. 479.

The reasoning in the above cases applies here under our statutes.

In *In re Smith,* 4 Colo. 532, a *habeas corpus* proceeding, upon the quashing of an indictment for defects, the trial court ordered:

"That the said defendant be let to bail in the sum of six hundred dollars to answer unto any indictment that may be found against him by the next grand jury of this county; and that in default of giving such bail he be remanded to the custody of the sheriff to await the action of said grand jury."

In refusing to discharge the prisoner, the supreme court of Colorado said:

"Although, except in the respect above indicated, the indictment, *as such,* was *functus officio*; although the petitioner could no longer be called upon to plead to it as an indictment, it nevertheless remained as a sworn accusation against the petitioner, affording *prima facie* evidence of probable guilt, upon which the district court was warranted in remanding him to answer a new indictment formally drawn and more specifically describing the particular crimes charged. This is a power which courts in this State are constantly exercising, and it is perhaps safe to say, that a court having cognizance of an offense has power to commit for it as a court, and the judge need not, therefore, for that purpose come down from the bench and act in his character as an examining magistrate."

Citing: 1 Bishop's Criminal Procedure, § 229, note; *United States v. Burr,* 1 Burr's Trial, 79; *United States v. Smith,* 2 Cranch, C. C. (U. S.) 111; *Gooden v.*

State, 35 Ala. 430; *Nicholls v. The State,* 5 N. J. L. 626; *Peter v. The State,* 3 How. (Miss.) 433.

In this state, where prosecutions are generally by information instead of indictment, the prosecuting attorney is charged with the duty and clothed with the power of the grand jury in other jurisdictions. His information is a sworn charge. By reason of our statute allowing an appeal in such a case, his information has not yet become *functus officio.* A warrant was issued under it, and the respondent took custody of the prisoner under and by virtue of that sworn charge. He still retains custody of the prisoner under the same authority. The prosecution has not been dismissed as contemplated by the statute. A sworn charge for a major offense still exists against the prisoner. It is still pending. The trial judge did not order the release of the prisoner. He is still within the jurisdiction of the trial court. Another information may be filed against the prisoner for the same substantive offense and the prisoner will be required to proceed to trial thereunder.

There being nothing in the information, as the court found, which could be construed as a legal defense or bar to the action, the court was warranted in refusing to discharge the relator. In fact, if he had discharged the relator, as the situation was and is, it would have been error. *State v. Bodeckar,* 11 Wash. 417, 39 Pac. 645. In that case we held that, where an information is found insufficient upon demurrer, unless the demurrer is sustained because the information contains matter which is a legal defense to the action, it is error for the court to discharge the defendant from custody.

Another statutory provision which may have some bearing upon the question before us is § 1076, Rem. Code (P. C. § 8040), providing:

"No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable on account of any defect in the charge or process, or for alleged want of probable cause; but in all cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, admit to bail, or recommit the prisoner, as may be just and legal, . . ."

Section 1075, Rem. Code (P. C. § 8039), also provides:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:— . . .

"3. Upon a warrant issued from the superior court upon an indictment or information."

This section also would seem to prevent the granting of the writ of *habeas corpus* in such cases as this; since the relator is being held upon a warrant issued from the superior court upon an information, even though the information upon which it was issued has been held defective, but not fatally defective, and the case ordered resubmitted and the relator recommitted to custody. See *In re Newcomb,* 56 Wash. 395, 105 Pac. 1042, and *In re Parent,* 112 Wash. 620, 192 Pac. 947.

Relator also contends that he is being denied the benefit of § 21, art. I, of the constitution of Washington, guaranteeing to accused persons a speedy trial by an impartial jury, etc., which was by § 29 of the same article declared mandatory and has been so held by this court.

It is alleged in a supplemental petition filed by relator that relator, through his counsel, on August 27, 1921, stated to the trial judge that relator was

desirous of having his case tried by a jury in the September jury session of the superior court; but respondent, in his answer and return to the supplemental petition, denies such allegation and sets forth what is alleged to be a complete statement of everything that transpired on that day before the court below. In those proceedings there is nothing to show that relator demanded a trial at that time, but that he demanded his discharge. While it is true that sixty days have more than elapsed since August 27, 1921, there is no record here showing that any application has been made to the trial court for a trial within sixty days by relator; and we have held, in *State v. Miller*, 72 Wash. 154, 129 Pac. 1110, that this right of the accused is waived by failure to ask for a trial, and acquiescence in the delay until the case has been set for trial upon the request of the state, where the state did not act arbitrarily and had a plausible excuse for the delay. We cannot say that the state did not have a plausible excuse for appealing from the order in the relator's favor upon the demurrer interposed by relator to the information, which demurrer apparently is the cause of the delay. Under the circumstances, as shown by the record here, we are of the opinion that the relator is not in position to urge this claim.

We conclude, therefore, that, under the facts shown in this case, the prisoner is not entitled to his discharge at this time.

Writ denied.

MACKINTOSH, HOVEY, and TOLMAN, JJ., concur.

FULLERTON, J. (concurring)—I concur in the conclusion reached in the foregoing opinion, but I cannot concur in the reasoning by which the conclusion is reached. After a demurrer has been sustained to an

indictment or information on grounds which do not go to the merits of the accusation against the accused, I have no doubt of the power of the court to remand the accused to await the return of another indictment or the filing of another information. This is a just inference from the statutes; even if it is not among the inherent powers of the court. But the case in hand is not this. Here the prosecution was by information, and when the demurrer was sustained thereto the prosecuting attorney announced that he would stand on the information, and gave notice of appeal from the judgment of the court. This was a refusal to file a new information, and, in my opinion, the court had but one of two courses to pursue; it could either remand the defendant and appoint a special prosecutor to conduct his prosecution, or it could have discharged the defendant. The court did not adopt in full either of these alternatives; it remanded the defendant without providing a means by which he could speedily be brought to trial. In this I think the court erred, but it is an error in procedure only, and is to be corrected by some one of the means provided by statute for correcting errors in procedure. *Habeas corpus,* as I understand its governing principles, is not such a remedy, and I therefore concur in the conclusion that the defendant is not entitled to a discharge under the writ now before us.

MITCHELL and BRIDGES, JJ., concur with FULLERTON, J.

PARKER, C. J. (dissenting)—I am unable to concur in the conclusion reached by either of the foregoing opinions in this case. I readily agree that, when a person is held in custody by virtue of a commitment of a court of competent jurisdiction issued in pursuance of a final judgment of conviction rendered by such

a court, *habeas corpus* is not a remedy available to him. I am of the opinion, however, that, when a person is held in custody merely to answer a criminal charge, and seeks his release from such custody by *habeas corpus* proceedings in a court of competent jurisdiction, the court may search the whole record of the proceedings upon which he is so held, with a view of determining the legality of his detention. I think that, when the record of the proceedings upon which the right and power of the sheriff to hold relator in custody is so searched, it shows that he is illegally held in custody and entitled to be discharged. For these briefly expressed reasons, which I do not deem it at present necessary to enlarge upon, I dissent.

[No. 16780. Department Two. April 13, 1922.]

R. H. MITCHELL *et al., Respondents,* v. R. I. CHURCHES, *Appellant,* A. E. COLBARD, *Defendant.*[1]

MUNICIPAL CORPORATIONS (386) — USE OF STREETS — PLEADING — AUTO IN CHARGE OF DRUNKEN DRIVER. A complaint against the owner of an automobile for damages caused by a drunken driver of the car states a cause of action where it alleges that the owner permitted the driver to take out the car knowing that he had a quart of whiskey, was going on a spree, and in the habit of getting drunk and liable to injure others while driving in that condition.

SAME (392)—USE OF STREETS—LIABILITY FOR ACTS OF DRUNKEN DRIVER—INSTRUCTIONS. In such a case, it is proper to instruct that the owner would be liable for damages for which the driver would be liable, if he loaned him the car knowing that he was liable to become intoxicated, under such circumstances as would produce in the mind of a reasonable man reasonable grounds for belief that he might become intoxicated.

SAME (389) — USE OF STREETS — INSUFFICIENCY OF EVIDENCE — DRUNKEN DRIVER. In such a case, there is sufficient evidence to go to the jury on the question of the owner's liability, where it appears

[1]Reported in 206 Pac. 6.

that the owner admitted that the driver and his companion were in the habit of taking the car out for parties after work, and that they could not have been very intoxicated because they had only one quart of whiskey with them and were good drinking men.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 19, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages sustained to an automobile through a collision. Affirmed.

Glenn C. Beechler, for appellant.

Flick & Paul, for respondents.

HOLCOMB, J. — Respondents had judgment in the court below for property damages in the sum of $747.25, alleged to have been sustained to their automobile through a collision between it and an automobile operated by defendant Colbard.

At the time of the collision, the automobile operated by Colbard belonged to appellant Churches. Churches was not in the automobile at the time nor present.

At the date of the accident, and for some time prior thereto, Churches was working as a salesman for a baking powder concern in Seattle. He was employed and paid by one Stout, who represented the company. Defendant Colbard worked for the same company. On the day of the accident, Churches permitted Stout to take the automobile, Churches and Stout testifying that Stout was going to use it for the purpose of going to a ball game with his wife. Stout often used the automobile in the business of the company for which he, Churches and Colbard worked. There was testimony by Stout and Churches that Stout paid Churches the sum of one dollar per week for the use of the car when he desired it; that Stout paid for some of the repairs and gasoline, and that Churches paid a part of

the expenses. After Stout left the office where he and Churches worked, he took Colbard and several others in the car, permitting Colbard to drive. At the time of the collision, Colbard was driving, and Stout was on the seat beside him.

The collision occurred about 4 o'clock in the afternoon of May 2, 1920, on Cherry street, between Fourth and Fifth avenues, in Seattle. This is a hill street, and respondents were driving down the street on the right-hand side towards Fourth avenue, while appellant's car was being driven up the hill towards Fifth avenue. The amended complaint alleged, and the evidence in behalf of respondents showed, that Colbard was pursuing a very erratic and zigzag course up the hill. There was evidence tending to show that Colbard and Stout were under the influence of liquor, and intoxicated at the time, and that the accident was due to the reckless speed at which Colbard was driving the car, and his intoxicated condition.

Stout, being absent from the state, was not sued. He testified by deposition.

The allegations of the amended complaint as to the ownership of the automobile were that Churches and Colbard were jointly interested in the car driven by Colbard at that time, using it in joint adventures and under joint payments of expenses. It is alleged that Colbard approached Churches on the day in question, stating to him that he would use the machine on that afternoon; that he and several friends were going out to a drinking party; that he, at that time, had a quart of whiskey with him, displaying it to Churches; that Churches well knew that Colbard was in the habit of getting drunk; that there was great danger that he might injure pedestrians or others when in that condition, and that well knowing the fact that it was the

intention of Colbard and his friends to go out upon a spree, as they termed it, he gave his consent to the use of the machine, well knowing the consequent danger.

Appellant demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action against him, which demurrer was by the court overruled. Churches then answered by way of general denial, and pleaded contributory negligence.

The first of the fourteen assignments of error by appellant is based upon the overruling of the demurrer to the amended complaint. The argument upon this assignment is that, even if defendants were the joint owners of the automobile being driven by Colbard, then, under the decisions of this court, Churches could not be held liable. It is asserted that this court has held that, when one of two persons, being joint owners of an automobile, was using it on a pleasure trip of his own, and not on behalf of, nor within the reasonable scope of, any partnership business, the other joint owner is not liable for damages sustained in a collision caused through the negligent driving of his co-owner; citing *Hamilton v. Vioue,* 90 Wash. 618, 156 Pac. 853, L. R. A. 1916E 1300; and that this court has always held that, in order to hold the owner of an automobile for the negligence of another in driving, the relationship of agency or service must be established; citing *Birch v. Abercrombie,* 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59; *Olsen v. Veness,* 105 Wash. 599, 178 Pac. 822, and *Olson v. Clark,* 111 Wash. 691, 191 Pac. 810. The statute, Rem. Code, § 5562-33, is also quoted as follows:

"Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil

action for damages by reason of injury to person or property resulting from the negligent use of the public highways by the driver or operator of any motor vehicle or its owner or his employee or agent, and the owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle."

Appellant insists that at best Colbard, in his relation to the machine at the time of the collision, could be considered only as a bailee, and that this could not in any way create a liability on the part of appellant for Colbard's negligence; citing *Lloyd v. Northern Pac. R. Co.*, 107 Wash. 57, 181 Pac. 29, 6 A. L. R. 307.

We have consistently held through a long line of decisions that the relation of owner and agency at the time of the act complained of must be established, or at least must present such a question of fact as to the truth of the agency on the part of the one causing the injury as to leave it a question for the jury. *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440; *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Delano v. La Bounty*, 62 Wash. 595, 114 Pac. 434; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040, 2 N. C. C. A. 422; *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 116 Pac. 861; *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, 2 N. C. C. A. 309; *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141; *Birch v. Abercrombie, supra; Maskell v. Alexander*, 91 Wash. 363, 157 Pac. 872, L. R. A. 1918C 929; *George v. Carstens Packing Co.*, 91 Wash. 637, 158 Pac. 529; *Peters v. Casualty Co.*, 101 Wash. 208, 172 Pac. 220; *Moore v. Roddie*, 103 Wash. 386, 174 Pac. 648; *Moore v. Roddie*, 106 Wash. 548, 180 Pac. 879; *Macale v. Lynch*, 110 Wash. 444, 188 Pac. 517; *Buckley v. Harkens*, 114 Wash. 468, 195 Pac.

250; *Samuels v. Hiawatha Holstein Dairy Co.*, 115 Wash. 343, 197 Pac. 24. And we have consistently held, as in *Purdy v. Sherman, supra,* and *Moore v. Roddie,* 103 Wash. 386, 174 Pac. 648, that, where nothing but the testimony of interested witnesses as to the ownership of the car and the agency of the driver at the time of the injury was presented to the jury, the jury was not bound to believe such testimony, where the ownership of the automobile was admitted or was conclusively shown to be in the defendant.

In the case at bar, while the ownership of the automobile was denied by appellant's answer, he admitted at the trial that he was the owner of the car, and in fact testified positively that he was the sole owner of it. The question of the sufficiency of the complaint, however, was determined by something more than the mere ownership of the car and the agency of Colbard. The complaint alleged that appellant knowingly loaned or let the car to Colbard to be used by him for pleasure purposes, knowing that at the time Colbard was drinking, and was going out on a drinking party, and had a quart of whiskey with him, and that appellant well knew that Colbard was in the habit of getting drunk, and that there was grave danger that he might injure pedestrians or others while in that condition; and, knowing that fact, and that it was the intent of Colbard and his friends to go out upon a spree, as they termed it, gave his consent to the use of the machine, well knowing the consequent danger.

These allegations, we consider, made the complaint invulnerable to demurrer. We consider it not only common sense, but common law and justice, that one cannot let or loan to another, knowing that other to be reckless and incompetent, and in such a condition that he would be reckless and incompetent, an instru-

mentality which may be a very dangerous one in charge of such a person. Berry on Automobiles (3d ed.), § 1040, states the rule to be:

"Aside from the relation of master and servant, the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom he has permitted to drive the same on the ground that such person, by reason of his want of age or experience, or his physical or mental condition, or his known habit of recklessness, is incompetent to safely operate the machine.

"An automobile is a machine that is capable of doing great damage if not carefully handled, and for this reason the owner must use care in allowing others to assume control over it. If he intrusts it to a child of such tender years that the probable consequence is that he will injure others in the operation of the car, or if the person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in intrusting the car to an incompetent person is deemed to be the proximate cause of the damage.

"In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation."

And in Huddy on Automobiles (5th ed.), § 642, it is said:

"If the person to whom the machine is loaned is an incompetent driver, it may be that the owner can be charged with negligence, but it is necessary in such a case that the injured person assume the burden of showing that the driver's want of skill was known to the owner."

It must be considered as incontrovertibly established that appellant was the owner of the car at the time of

the injury. It is also indisputably established that the car was not being used in any business for appellant, or for his benefit, but was being used solely for the pleasure of Stout and Colbard.

The question presented for determination here is whether Churches, as owner of the car, would be liable for damages caused by Stout and Colbard if, as alleged in the complaint, Churches knew or had reason to believe that Stout and Colbard were incompetent or reckless persons to drive the car or have it in their charge; and the circumstances were such that he was negligent in permitting them to take the car out upon that occasion.

The case went to the jury under instructions by His Honor, the trial judge, that if Churches loaned the automobile with the intention or understanding that Colbard was to drive it, and with the knowledge that Colbard was likely to become under the influence of intoxicating liquors, and if, with that knowledge, he intrusted the automobile to Colbard under such circumstances as would produce in the mind of a reasonable man reasonable grounds for belief that the driver of the automobile might become intoxicated, then and in that event, if Colbard is liable, Churches would be liable. The jury were further instructed that to determine Colbard's liability, whether he was negligent or not, depends upon how well his conduct conformed to the rules of law relating to drivers of automobiles; and that it is the law that no person, while intoxicated, shall operate an automobile on the streets of Seattle; and that if Colbard operated the auto in violation of, or without regarding any of the foregoing rules, then he is guilty of negligence, and if his negligence were the proximate cause of the collision he would be liable.

While the question is one of first impression in this state, we are inclined to the view that the trial court was correct as to the law of the case and instructed the jury properly in that regard. It is well settled, and we held in *Moore v. Roddie,* 106 Wash. 548, 180 Pac. 879, that automobiles are not to be classed with such highly dangerous agencies as dynamite or ferocious animals, and are not dangerous *per se.* Prudently driven they are safer than horse-drawn vehicles, but unskillfully or recklessly driven they are much more dangerous than horse-drawn vehicles, and on that account, as well as the temptation to speed, which they constantly present, surely impose upon owners some degree of care in the selection of experienced drivers for them. In the case of a mere permissive use, the liability of the owner should rest not only upon the fact of ownership, but upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent and reckless driver, and of the driver in its operation. *Parker v. Wilson,* 179 Ala. 361, 60 South. 150, 43 L. R. A. (N. S.) 87.

One of our great difficulties here is in determining whether or not there was sufficient evidence to go to the jury as to appellant's negligence in letting or loaning the automobile to Colbard and Stout. There is no doubt, under the evidence in this case, that Colbard was driving, at the time of the accident, very incompetently and recklessly, and was zigzagging back and forth across the street at a very high rate of speed. The collision was unavoidable on the part of respondents. One of the plaintiffs testified that, when the three men got out of appellant's car, he could smell liquor strongly upon the breath of Colbard. One of the men ran from the scene, and one of them was said to have

fallen upon the street. The next morning appellant stated, in the presence of one of the plaintiffs and a disinterested witness, something to the effect that the men in the car could not have been greatly intoxicated because they had only one quart of whiskey with them and that they were good drinking men. Plaintiff Mitchell also testified that appellant stated to him that Stout and Colbard were in the habit of taking the car out for parties after they got off shift on Saturday afternoons. Stout and Churches both testify that they did not have the habit of taking the car out on parties on Saturday afternoons, and that Stout and Colbard were not intoxicated, although Stout admitted that they had taken a drink about 10 o'clock in the forenoon in the office. They are both interested witnesses, whom the jury were not bound to believe.

While the evidence is extremely slight, as was stated by the trial judge, nevertheless the trial judge in the exercise of his discretion refused to grant a new trial, and also denied the motion for judgment n.o.v., and we are of the opinion that the evidence was sufficient to submit to the jury, and from which the jury might fairly infer the negligence of appellant alleged in the complaint.

The judgment is therefore affirmed.

PARKER, C. J., MAIN, and MACKINTOSH, JJ., concur.

[No. 16838. Department One. April 13, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. WARD DANIELS *et al.*, *Appellants*.[1]

LARCENY (1)—OFFENSES CONSTITUTING—STATUTES. Rem. Comp. Stat., § 2601, making it larceny to take, lead or drive away the property of another with intent to deprive the owner thereof, defines a distinct offense and is not superseded by Id., § 2601-1, providing that any one who intentionally takes or drives away any motor vehicle of another shall be deemed guilty of a felony; and the latter offense does not necessarily include the idea of theft.

HOMICIDE (268)—QUESTION FOR JURY—COMPLETION OF LARCENY BEFORE KILLING. In a prosecution for first degree murder, under Rem. Comp. Stat., § 2392, subdiv. 3, for the killing of a policeman while accused was engaged in the larceny of an automobile, whether the crime of larceny had been completed was properly left to the jury, where the accused had stolen the car at ten o'clock the night before, driven it six or seven miles, and left it and returned the next morning and were in the act of starting it, when the officer arrived and was shot and killed by one of their associates.

HOMICIDE (3½)—FIRST DEGREE—KILLING IN PERPETRATION OF LARCENY—CONTINUING OFFENSE. The offense of larceny is a continuing one, and possession of the stolen property after the crime constitutes a continuance of the offense, making the killing of an officer while accused was in the act of driving away a car, stolen the night before, murder in the first degree.

Appeal from a judgment of the superior court for King county, French, J., entered March 24, 1921, upon a trial and conviction of murder. Affirmed.

John F. Dore and *Carl E. Croson*, for appellants.

Malcolm Douglas, *John D. Carmody*, and *E. I. Jones*, for respondent.

BRIDGES, J.—The information in this case charged the defendants with murder in the first degree, committed while they were unlawfully and feloniously engaged in the commission of the larceny of a certain

[1]Reported in 205 Pac. 1054.

automobile. They have appealed from a judgment of sentence entered on the verdict of guilty.

The facts controlling the questions presented on the appeal are as follows: About ten o'clock p. m. of January 13, 1921, the appellants, with another, stole a Cadillac automobile belonging to a Mrs. Sullivan, and which automobile was, at the time of the theft, standing in front of her residence in the city of Seattle. The automobile was at once driven to Magnolia Bluff Boulevard, some six or seven miles from the home of Mrs. Sullivan, and was there left beside the road. The appellants, together with their associate, then came into the city, where they spent the night at a hotel. The next morning they went to the place they had left the automobile, for the purpose of getting it and driving it away. They were in the act of starting the machine when certain police officers drove up and accosted them. During the altercation, the associate of the appellants shot and killed one of the officers, and was himself killed.

Section 2392, Rem. Code, reads as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either . . . (3) Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; . . ." [Rem. Comp. Stat., § 2392.]

The first contention of the appellants is that the court erred in overruling their demurrer to the information. They contend that the taking of the automobile, as alleged in the information, was not a larceny under our statutes. It is argued that, in so far as automobiles are concerned, ch. 64, Laws of 1919, p. 131,

supersedes section 2601, Rem. Code (P. C. § 8944). The last named section reads as follows:

"Every person who, with intent to deprive or defraud the owner thereof—(1) Shall take, lead or drive away the property of another; . . . steals such property and shall be guilty of larceny." [Rem. Comp. Stat., § 2601.]

Section 1, ch. 64, Laws of 1919, p. 131, reads as follows:

"Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, . . . shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony." [Rem. Comp. Stat., § 2601-1.]

These two statutes concern two distinct crimes. To make one guilty of larceny under § 2601, it must be shown that he took the property with intent to deprive or defraud the owner thereof; whereas, one may be guilty of the other offense by merely intentionally taking and driving away the vehicle without permission of the owner, the idea of theft not being necessarily connected with that offense. We are therefore of the opinion that the demurrer was properly overruled.

The appellants further argue that the testimony conclusively shows that, at the time of the killing, the larceny had been completed, and that they were not then engaged in the commission of that offense, as charged in the information. Whether the crime of larceny had been completed or was still being committed at the time of the killing is a question of fact,

and that fact was properly submitted to the jury by the court when it said that, in order to convict the defendants of the offense charged, the state is required to prove beyond a reasonable doubt that, at the time of the killing, the appellants were engaged in the commission of a larceny of the automobile in question, and that while they were so engaged the killing was done. Under no circumstances can it be said, as a matter of law, that, at the time of the killing, the act of larceny had been completed. The appellants had taken the automobile but a short distance from the place they stole it, and when the killing occurred they were in the act of taking it still farther away. The mere fact that a few hours intervened between the time the automobile was taken from in front of the owner's house and the time it was taken from the place where the appellants had left it, does not—and cannot—conclusively show that the crime had been completed. Under all the circumstances, therefore, it was proper for the court to submit to the jury the question whether the appellants were in the act of committing larceny of the automobile when the shooting occurred.

But there is still another reason why the position of appellants cannot be maintained. Under all the authorities, the crime of larceny is a continuing one. In 17 R. C. L., p. 45, it is said:

"It was early settled in England, however, that one stealing goods in one county of the realm might be indicted for the larceny in any other county into which he may have carried the stolen goods, upon this principle: That the possession of goods stolen by the thief is a larceny in every county into which he carries the goods, because, the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation. The English com-

mon law rule has been universally adopted in this country."

Clark & Marshall, Law of Crimes, p. 733, stated that:

"If a man steals property he commits a trespass, and he is guilty of a continuous trespass and asportation during every moment in which he retains possession."

To the same effect see *State v. Sommerville,* 21 Me. 14; *State v. Trexler,* 4 N. C. 90, 6 Am. Dec. 558; Wharton's Criminal Law, p. 1390. See, also, *State v. Carroll,* 55 Wash. 588, 104 Pac. 814, 133 Am. St. 1047, where the court recognizes this principle.

We do not find any error; the judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 17093. *En Banc.* April 13, 1922.]

THE STATE OF WASHINGTON, *on the Relation of* B. TINGSTAD, *Appellant,* v. MATT STARWICH, *Respondent.*[1]

CRIMINAL LAW (370)—SUSPENSION OF SENTENCE. Under Rem. Comp. Stat., § 2280, to suspend a sentence, if a prisoner is sentenced to a term in the county jail, he must be put in charge of some parole or peace officer not necessarily connected with that institution; and if sentenced to a state penal institution, he must be put in charge of a parole officer of such institution.

CONSTITUTIONAL LAW (40)—DISTRIBUTION OF POWERS—ENCROACHMENT ON EXECUTIVE—PARDONS AND PAROLES. Rem. Comp. Stat., § 2280, authorizing the court to suspend a sentence, is not violative of Const., art. 3, § 9, vesting the pardoning power in the governor; and the statute does not authorize a pardon, but only to suspend, "until otherwise ordered by such court."

CRIMINAL LAW (370)—SUSPENSION OF SENTENCE—POWER TO ENFORCE. Where a sentence has been suspended under Rem. Comp. Stat., § 2280, the fact that the prisoner was not placed in charge of

[1]Reported in 206 Pac. 29.

some parole or peace officer, as required by law, does not deprive the court of jurisdiction to enforce the judgment upon the breaking of the parole.

SAME (370). Where a sentence is suspended and the prisoner released on parole, the court does not lose jurisdiction to enforce the judgment by lapse of the time which the sentence covered.

Appeal from a judgment of the superior court for King county, Hall, J., entered June 27, 1921, denying a writ of habeas corpus and remanding petitioner to jail to serve a suspended sentence, upon sustaining a demurrer to the petition. Affirmed.

E. P. Donnelly, for appellant.

Malcolm Douglas and *Ewing D. Colvin,* for respondent.

BRIDGES, J.—On June 27, 1921, in the superior court of King county, G. W. Berg pleaded guilty to the charge of vagrancy, and was sentenced to serve a term of six months in the jail of that county. The judgment provided, however, that the sentence was "suspended during good behavior and until the further order of the court." Thereafter the defendant was given his liberty. More than six months after the entry of this judgment, the prosecuting attorney of King county petitioned the court to set aside and vacate so much of the judgment as suspended the operation of the sentence. On this application Berg was again arrested on a bench warrant and brought into court. The court being satisfied that Berg had violated the terms upon which the suspension of execution of sentence was made, entered an order revoking such suspension, and directed Berg to be confined in the county jail for a period of six months, as provided in the original judgment. Thereafter this petition for a writ of habeas corpus was presented, which, in substance, sets

out the facts above recited and alleges that Berg is deprived of his liberty without warrant of law. A demurrer to the petition was sustained, and the court's order was that Berg be remanded to the custody of the sheriff of King county to be confined in the county jail, as provided in the sentence. From this judgment, an appeal has been taken.

The courts are in irreconcilable conflict on the question whether the trial court, in a criminal case, has power to suspend the execution of a sentence where there is no statute authorizing such action. Some courts hold that, in the absence of a statute, any action of the court suspending the execution of a sentence is void and of no effect, while other courts hold that the court passing the sentence has an inherent right to suspend it for an indefinite time. It is not necessary, however, that we discuss this question, because during all of the times mentioned, there was a statute in this state which reads as follows:

"Whenever any person never before convicted of a felony or gross misdemeanor shall be convicted of any crime [except certain designated ones not involved here] the court may in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by such court, and that the sentenced person be placed under the charge of a parol or peace officer during the term of such suspension, upon such terms as the court may determine. In no case shall a sentence be suspended under the provisions of this section unless the prisoner if sentenced to confinement in a penal institution be placed under the charge of a parol officer, who is a duly appointed and acting officer of the institution to which the person is sentenced." Laws of 1921, ch. 69, p. 204; Rem. Comp. Stat., § 2280.

Inasmuch as the record fails to show that, at the time of the suspension of the operation of the sentence,

the court placed the prisoner in charge of any parole or peace officer, but, on the contrary, seems to show that such was not done, it becomes essential for us to construe that portion of the section of the 1921 laws with reference to placing the prisoner in charge of some parole or other officer. That law is an amendment of § 2280, Rem. Code (P. C. § 8715), and went into effect less than thirty days prior to the passing of sentence in this case. The original act did not require that the prisoner be put in charge of any officer. The statute is not clearly worded. The last portion of the first sentence requires the prisoner to be put in charge of a "parol or peace officer," while the second sentence requires that if he be sentenced to a "penal institution" he must be put in charge "of a parol officer" connected with that institution. Our statutes provide for parole officers for state penal institutions but not for jails. It would seem that, in speaking of penal institutions, the legislature had in mind such penal institutions as are maintained by the state. Our construction of this statute is that, if the prisoner be sentenced to serve a term in the county jail, he must, if operation of sentence be suspended, be put in charge of some parole or peace officer, who need not necessarily be connected with that institution; and if he be sentenced to a state penal institution, he must, if operation of sentence be suspended, be put in charge of some parole officer of such state institution.

The appellant contends, first, that the statute authorizing the court to suspend operation of a sentence indefinitely is unconstitutional because the constitution places the power of parole and pardon in the executive; and second, if the statute is not unconstitutional, then, because the court suspended the execution of the sentence in a manner contrary to that

provided in the statute, its order was void and it lost jurisdiction to thereafter require the sentence to be served; and third, that, in any event, the court did not have power to compel the prisoner to serve the sentence after the period of the sentence had expired.

(1) We think the statute authorizing suspension of the operation of a sentence is not violative of the constitution. Section 9, Art. III, of that instrument reads:

"The pardoning power shall be vested in the governor, under such regulations and restrictions as may be prescribed by law."

Section 11 of the same article provides that:

"The governor shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law, . . ."

The statute does not undertake to empower the court to pardon or remit fines and forfeitures. It goes no farther than to permit the court to suspend the operation of the sentence "until otherwise ordered by such court . . ." The constitution does not vest in the executive exclusive or any direct authority to parole a prisoner. It is true another statute authorizes a certain board of which the governor is a member to parole on good behavior, but it exercises such power only after the sentence has been put into operation by the court. The court, by the terms of the statute, suspends—paroles, if you please—after sentence, but before it is put into effect. It must be admitted that there is a conflict of authority on this question. Some of the cases hold that the court has no power to suspend the operation of a sentence because so to do would be an encroachment on the constitutional power of the executive, and that any statute which undertakes to give such power is unconstitutional. *In re Webb*, 89

Wis. 354, 62 N. W. 177, 46 Am. St. 846, 27 L. R. A. 356; *Ex parte Clendenning,* 22 Okl. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041; *Snodgrass v. State,* 67 Tex. Cr. 615, 150 S. W. 162, 41 L. R. A. (N. S.) 1144; *Neal v. State,* 104 Ga. 509, 30 S. E. 858, 69 Am. St. 175, 42 L. R. A. 190; *People v. Brown,* 54 Mich. 15, 19 N. W. 571. Other cases may be found in those here cited. Some of the decisions holding to the contrary are: *Ex parte Bates,* 20 N. M. 542, 151 Pac. 698, L. R. A. 1916A 1285; *People ex rel. Forsyth v. Court of Sessions of Monroe County,* 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; *In re Giannini,* 18 Cal. App. 166, 122 Pac. 831; *People ex rel. Dunnigan v. Webster,* 14 Misc. Rep. 617, 36 N. Y. Supp. 745; *People v. Goodrich,* 149 N. Y. Supp. 406; *Ex parte Slattery,* 163 Cal. 176, 124 Pac. 856, 8 R. C. L. 248. We elect to follow those cases holding such a statute constitutional. This court, in *State v. Mallahan,* 65 Wash. 287, 118 Pac. 42, has recognized the validity of our statute authorizing the stay of the operation of a sentence. We there said:

"That the court had authority to suspend the sentence and later commit the appellant is unquestionably shown" by the statute. "As to the power of the court to enforce a suspended sentence under these sections, there can be no question."

(2) If, in suspending the operation of the sentence, the appellant had been put in custody of some officer as provided by the statute, we have no doubt the court could, at any time thereafter, upon a showing of a breach of the terms under which the suspension was made, set aside the suspension order and enforce the original judgment for the full term of six months. The statute authorizing the suspension of the execution of the sentence seems to contemplate that this not only may but shall be done, because it authorizes the

suspension until the further order of the court. The appellant, being the recipient of the favor conferred by the statute, is in no position to claim that the court has lost jurisdiction or power to subsequently commit him. He was lawfully sentenced for six months, and he was relieved, upon certain conditions, from serving that sentence. If he break his parole, the court has a perfect right to annul the order of leniency and enforce the original sentence.

"Where the execution of sentence has been suspended as authorized by the probation statute, such order is effective until revoked or modified; and it is improper to issue a commitment for one released until such judgment suspending sentence is modified. However, after suspending the execution of sentence, the court may order the issuance of a commitment and direct the enforcement of the original judgment. . . Where the execution of sentence is suspended, the period during which defendant is in the custody of the probation officer is not part of the term of his sentence; and where the suspension is revoked the term of sentence runs from the time of such revocation, not from the time of the commitment to the probation officer." 16 C. J. 1336.

Such we say would have been the prisoner's situation if the suspension of the enforcement of the judgment had been in strict compliance with the letter of the statute, but the situation cannot be changed merely because the court did not place the defendant in charge of some parole or peace officer as the law required. The statute gives the court power to suspend the execution of the sentence, and the erroneous exercise of that power cannot deprive the court of jurisdiction over the appellant to enforce the judgment it has entered. The validity of that judgment is not affected by the regular or irregular exercise, by the court, of the statutory power. We have held that a judgment

of sentence made under a wrong statute, or for an unauthorized period, does not deprive the court of jurisdiction to impose and enforce a sentence according to law. *In re Newcomb,* 56 Wash. 395, 105 Pac. 1042; *In re Blystone,* 75 Wash. 286, 134 Pac. 827; *State v. Gilluly,* 50 Wash. 1, 96 Pac. 512. In the case of *State v. Mallahan, supra,* discussing the power of the court to suspend the operation of a sentence, we said:

"Appellant insists his release was in effect a final discharge as a release at common law, in that it did not expressly comply with the statute by directing the release during his good behavior. We find no merit in this contention. The suspension was granted under the statute, although the words 'good behavior' were omitted from the order which provided that appellant should report weekly to an officer and once each month to the court. This could have been for no other purpose than to keep them advised as to his conduct whether it constituted good behavior."

If we should agree, however, with appellant's contention that the order of the court suspending the execution of the sentence was void, still it would not follow that the court has lost jurisdiction or power to enforce its original judgment. We cannot see any possible reason why a court should be without power to enforce its sentence simply because it has, without authority of law or contrary to such authority, undertaken to suspend the operation of the sentence. The appellant has cited the following cases, among others, in support of his argument: *In re Strickler,* 51 Kan. 700, 33 Pac. 620; *In re Markuson,* 5 N. D. 180, 64 N. W. 939; *In re Webb,* 89 Wis. 354, *supra; United States v. Wilson,* 46 Fed. 748; *Ex parte Clendenning, supra; State ex rel. Dawson v. Sapp,* 87 Kan. 740, 125 Pac. 78, 42 L. R. A. (N. S.) 249; *Spencer v. State,* 125 Tenn. (17 Cates) 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680.

Most of these cases hold that, in the absence of a statute authorizing the suspension of a sentence, the court is powerless to suspend and his action in so doing is void. But only three or four of them hold that the court is without power and jurisdiction, after making the void order, to enforce its original sentence. We will now briefly review some of these cases.

In *Spencer v. State, supra,* it was held that the trial court had power to enforce its judgment, even after making a void order indefinitely suspending its execution, saying:

"We therefore hold that the stay of execution was merely void. This being true, he [the court] had the right to cause a capias to issue to take the plaintiffs in error into custody, to the end that they might serve their sentence."

In the case of *In re Markuson, supra,* it was held that while, in the absence of a controlling statute, the court had no power to suspend the operation of a sentence, yet, after undertaking so to do, the judgment might be enforced.

In *United States v. Wilson, supra,* it was held that where the trial court had no power to suspend it had no power to revoke the suspension, and no power to subsequently enforce the sentence.

In the case of *State ex rel. Dawson v. Sapp, supra,* it was held that, in the absence of an authorizing statute, the court had no power to suspend the operation of a sentence, and having made a void order of suspension, had no power, after the term, to either revoke the suspension or to commit the defendant. The reason given by the court for this holding is that:

". . . the defendant ought not, in the absence of a statute permitting it, to be held in fear of punishment which may or may not be inflicted at the pleasure of those in authority."

A similar holding seems to have been made in *Ex parte Clendenning, supra.*

In the case of *In re Webb, supra,* it was held that, although the court was without power to suspend the operation of the sentence, it might during the term, but not after, enforce it.

In the case of *In re Strickler, supra,* the holding is substantially to the same effect.

It will thus be noted that some of the cases cited by the appellant hold that, after the court has made a void order suspending the execution of sentence, it loses jurisdiction to enforce the sentence, while other of such cases hold to the contrary. We are unable to follow those courts which hold that the trial court has exhausted its power and authority upon the making of a void order suspending the execution of sentence.

An important case upon this subject is that of *Ex parte United States,* 242 U. S. 27, 37 S. Ct. 72, Ann. Cas. 1917B 355, L. R. A. 1917E 1178. The facts there were that, after the defendant was sentenced, the court suspended its operation during good behavior. There was no statute authorizing this action. The supreme court of the United States, after making an exhaustive review of the whole subject, holds that the trial court was without power to suspend the operation of the sentence and that its action was void. The court directed the trial court to set aside its order suspending the execution of the judgment, and while it did not expressly direct that, upon the setting aside of the suspension, the original sentence should be put into effect, it cannot be doubted that such was the effect of the decision; otherwise it would have been useless to have ordered the suspension of the execution of the sentence set aside. It is plain that the court in this case held that the trial court did not lose its power to

enforce its sentence simply because it had made a void order suspending its operation indefinitely and during good behavior. The following cases support the view here announced. *State v. Abbott,* 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B 1189, 33 L. R. A. (N. S.) 112; *Neal v. State,* 104 Ga. 509, 30 S. E. 858, 69 Am. St. 175, 42 L. R. A. 190; *Gray v. State,* 107 Ind. 177, 8 N. E. 16; *Miller v. Evans,* 115 Iowa 101, 88 N. W. 198, 91 Am. St. 143, 56 L. R. A. 101; *Fuller v. State,* 100 Miss. 811, 57 South. 806, Ann. Cas. 1914A 98, 39 L. R. A. (N. S.) 242; *Spencer v. State, supra.* The notes to such of these cases as are in the L. R. A. series will give the many cases on this subject. The real question involved here is whether the court had power to commit the defendant after it had made its order suspending the sentence. We hold that it had such power, even though its order suspending the operation of sentence was void.

(3) The appellant argues that, in any event, he cannot be committed after the expiration of the period of the original sentence, because to so hold would authorize the court at any and all times to enforce its sentence, thus hanging it over him all the days of his life. This, however, is no valid argument in support of his position. He cannot wipe out the sentence lawfully imposed upon him without paying the penalty. If he does not wish to have the sentence hang over him he has a perfect right to refuse the clemency of the court and serve his time. The very purpose of permitting the court to suspend the operation of the sentence is to give the defendant an opportunity thereafter to comport himself with good behavior. If he does not so do, he cannot complain if he is required to serve the sentence. It is true there are a few cases which seem to hold to the contrary, but in the light of the purpose of our statute authorizing the court to suspend sentence,

we cannot follow those cases. The following are some of the cases supporting our view. *State v. Abbott, Fuller v. State,* and *Spencer v. State, supra.*

The judgment is affirmed.

FULLERTON, MAIN, HOLCOMB, TOLMAN, MITCHELL, HOVEY, and MACKINTOSH, JJ., concur.

PARKER, C. J. (concurring in part)—I concur in the result reached in the foregoing opinion, because of the fact that the court, in suspending sentence, did not, in connection with its order of suspension, place the defendant "under the charge of a parol or peace officer during the term of such suspension," as required by the statute. Had this been done and the defendant so held under restraint, I would be strongly inclined to hold that whatever time he was so held under restraint would be to his credit upon the whole time for which he was adjudged to serve as a punishment, and that if he were so held under restraint during the whole time for which he was adjudged to serve as a punishment, he would have then paid the full penalty of the judgment. I do not now want to give my assent to a view contrary to this, as I fear I might be doing by unqualifiedly concurring in the foregoing opinion.

[No. 16744. Department One. April 13, 1922.]

D. CORNWELL, *Appellant*, v. J. M. SLEICHER *et al.*, *Respondents*.[1]

PHYSICIANS AND SURGEONS (10-1, 11)—MALPRACTICE—EVIDENCE—SUFFICIENCY. It is error to grant a nonsuit in an action for malpractice in failing to properly reduce a simple fracture of the radius of the right arm, where it appeared there was no misuse of the arm during the treatment, and that at the time of the discharge the arm was crooked and shortened, there was a visible lump, constant pain and loss of flexion and a second operation was necessary to make the arm even passably usable.

Appeal from a judgment of the superior court for Lewis county, Abel, J., entered March 22, 1921, upon granting a nonsuit, dismissing an action for malpractice, tried to the court and a jury. Reversed.

C. D. Cunningham and *Forney & Ponder*, for appellant.

Bates & Peterson and *A. E. Rice*, for respondents.

FULLERTON, J.—This is an action for malpractice. On the trial in the court below, which was entered upon by the court sitting with a jury, the plaintiff was nonsuited at the conclusion of his evidence, and appeals from the judgment later entered.

The evidence which the jury would have been entitled to believe, had the cause been submitted to them, was, in substance, this: The plaintiff suffered a fracture of a bone in his right arm through an accidental cause. The fracture was an oblique fracture of the radius, the fracture being about midway between the elbow and the wrist. The plaintiff lived in a rural neighborhood, and, after receiving the injury, consulted a local physician. The physician gave him temporary aid and ad-

[1]Reported in 205 Pac. 1059.

vised him to consult a surgeon, as he (the physician) did not have the facilities necessary to properly reduce the fracture. The plaintiff thereupon consulted the defendant Sleicher, a physician and surgeon practicing at Chehalis. The defendant undertook to reduce the fracture. He first took radiographs of the arm from two positions, and thereby discovering the nature of the fracture, sought to reduce it by "extension and counter-extension." After satisfying himself that he had the bones in place, he put upon the arm a wire splint intended as a temporary support, the swollen condition of the arm then forbidding placing it in a permanent cast. Another radiograph was then taken. The defendant being satisfied that the bones were in place, instructed the plaintiff as to the manner of carrying the arm in the meantime, and to return in ten days, when he would put on a permanent cast. The plaintiff returned as directed, whereupon the defendant removed the splint, and ocularly and digitally examined the fracture. He then remarked "that the bones were not quite together and he would slip them," and this he sought to do by pressure. The plaintiff then called his attention to a protuberance at the wrist, and examining this, the doctor remarked that the bone would have to be slipped a little, and proceeded to manipulate it. After working upon it for a moment, a "catch or snap was heard," when the protuberance disappeared. The doctor then placed the arm in a plaster cast, and told the plaintiff to return in three weeks. The plaintiff again returned as directed, when the doctor removed the cast. He then examined the arm and pronounced it satisfactorily healed. The plaintiff then called his attention to the fact that the arm was crooked and that it did not have its usual motion. The doctor then had him move his arm in

various directions, and told him that the difficulties complained of would be overcome in a short time. He then gave the plaintiff directions as to its future use; telling him the arm "was all right, but to be careful of it for a couple of weeks, then to go to work with it gradually and not strain it." The plaintiff then started for his home, riding in an automobile driven by his son. The arm soon became excessively painful. On feeling of his arm, he found a lump on the arm underneath the fracture, which he described by saying that "it seemed like I could hook my thumb right under the end of the bone sticking out." On reaching home, his son and some of his neighbors examined the arm. Testifying, they described it as crooked, and that there was a bunch underneath the arm, not only palpable to the touch, but visible to the eye.

The plaintiff, because of pain, carried the arm in a sling for a period of three weeks, and after taking it from the sling was unable to use it at all for a time, and after that only to a limited extent and with great pain. The plaintiff then consulted with another surgeon. This surgeon took radiographs of the arm, with the arm in the same positions it was when the first of the radiographs was taken. These, with other examinations made by him, convinced him that the arm required further treatment. He first thought it feasible to break the bony union which had formed and reset the bone. On further consideration, however, he concluded it was not so feasible, and treated the arm by cutting into the arm and chiseling off a protruding end of the fractured bone. The surgeon described the arm as showing "a slight angle," and a "very little shortening." He also testified that there was some loss of movement.

The plaintiff called the defendant as a witness on his own behalf and had him describe the treatment he

gave the arm and identify the radiographs taken by him. On cross-examination by his own counsel, he testified that the bones were in apposition when he put on the wire splint and the permanent cast, and were so when he removed the latter. The second surgeon, in answer to a hypothetical question embracing this idea put to him on cross-examination, testified that the treatment was that prescribed by all of the books, and such as is commonly afforded by all physicians practicing in the defendant's neighborhood. On redirect examination, however, he testified as follows:

"Q. Doctor, if in spite of the fact he placed this splint upon his arm, made a digital and an X-ray examination, and afterwards put the arm in a plaster cast and gave the patient instructions, and after the plaster cast was removed, nevertheless the bone was not in place, what would you say? A. Well, am I to admit it was not in place when it was taken off? Q. After the plaster cast was removed it was not in place, that is, not in apposition, what would you say as to whether the treatment was skillful or not? A. Well, I understand it was in apposition. Q. Well, we will suppose now it was not in apposition. A. Well, if it was not in apposition it was not skillful, but we grant that it was."

On further examination he testified that he knew nothing about the condition of the arm when the defendant quit treating it, and that it was not uncommon, under the best treatment of fractures of this kind, for the arm afterward to show a little shortening. Both of the doctors agreed that fractures of this character and at this place were not difficult of reduction.

The radiographs were introduced in evidence. The first of those taken by the defendant and those taken by the second surgeon are very distinct. The first clearly shows the nature of the fracture of the radius, and further shows, what the defendant did not dis-

cover until his attention was subsequently called to it by the plaintiff, a displacement of the ulna at the wrist. The second shows that the broken bone knitted while not in direct alignment, but while at an angle, and with one end of the fractured bone overlapping the other and protruding into the surrounding muscles. The second of the radiographs, the one taken after the wire splint was put on the arm, discloses nothing of the condition of the broken bone visible to the eye of a layman. There was further testimony on the part of the plaintiff that the arm had not regained its normal strength up to the time of the trial; that it was still crooked, and that there was a loss of flexion—the up and down movement of the wrist. The plaintiff testified to the effect, also, that he at all times followed the directions given him by the defendant as to the care of the arm, and that he did not misuse it in any manner.

Passing to the legal aspects of the case, it is the respondent's contention, and it was the view of the trial court, that there is not in the record any competent evidence showing that the treatment afforded the plaintiff by the defendant was negligent or unskillful; in other words, that it is not shown by competent evidence that the defendant did not bring to his treatment of the plaintiff's injury that degree of skill and care which is usually brought to the treatment of such injuries by surgeons practicing in the general locality in which the defendant resides. Perhaps the contention can be made more clear by quoting from the language of the defendant's learned counsel as used in their brief. They say:

"We do not contend for a minute in this court that a layman cannot testify to anything. The patient and the lay witnesses who were present have a right to

testify as to what the doctor did; as to whether he used an anaesthetic; as to whether he used instruments and as to whether the arm appeared crooked or straight, or whether there was anything different in the appearance of the arm after the operation than it was before. . . . We do not contend, however, that while a lay witness may testify to certain things, or certain appearances, or certain happenings, he cannot testify that the cause of the things, appearance or happenings was the result of either improper or unskillful treatment or negligence on the part of the attending physician or surgeon, and that before a jury or a court could decide that the said appearance, happenings or things observed and testified to by lay witnesses was the result of improper or unskillful treatment by a surgeon, there must be evidence of experts skilled in the profession to that effect. . . . In other words, in the instant case, lay witnesses may testify as to the condition of the arm when they saw it as to whether it was abnormal or not or looked different from what it did before the fracture, but neither a court nor a jury would be justified in determining that that condition was the result of improper or unskillful treatment until some expert has so testified."

And again:

"So in the instant case. While lay witnesses testified as to what was done by the doctor, and to the result, no witness has testified that that result was so caused by any improper or unskillful treatment."

With reference to the proposition, namely, that there must be evidence by a person skilled in the science of surgery that the treatment of a particular injury is negligent and unskillful before a court or jury can pronounce it so, we have heretofore dissented, and are not now in accord. As we said in *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235, the proposition is sound only when soundly applied. In that case the surgeon operating upon a patient left a part of the instrument with which he was operating—a metallic

spring twelve inches in length and a sixteenth of an inch in width—in the body of his patient. It was held that it did not require expert evidence to prove that the act was negligent, but, on the contrary, the jury had abundant justification to so find from proof of the fact alone. Other illustrations might be given, but the one is enough to make clear the point that there must be, in the nature of things, many instances where the facts alone prove the negligence, and where it is unnecessary to have the opinions of persons skilled in the particular science to show unskillful and negligent treatment. It seems to us that this is an instance of that sort. Both the defendant and the other surgeon testifying say that the fracture was without complications and one easy of reduction. The radiographs produced by the different surgeons show that the bones knitted much in the same position they were prior to any attempt at reduction. This taken with the evidence of the lay witnesses to the effect that there was no misuse of the arm between the time the fracture was reduced and the time the patient was discharged as cured; that, at the time of the discharge, the arm was crooked and shortened; that there was a lump in the region of the fracture palpable to the touch and visible to the eye; that there was a loss of flexion and almost constant pain in the arm, and that a second operation was necessary to make it even passably usable, is sufficient, in our opinion, to make the question whether the defendant had brought to the treatment of the arm that degree of care and skill usually brought to the treatment of similar fractures by surgeons practicing in his locality, one of fact for the jury rather than one of law for the court.

Moreover, we think there was here expert testimony to the effect that the treatment afforded the plaintiff

was unskillful. The second surgeon based his opinion that the treatment was skillful upon a hypothetical question which assumed that the fracture was reduced by the operating surgeon, the fractured bones placed in apposition, and that they were so at the time the permanent cast was put on the arm. In the quoted portion of his testimony, however, he expressed the opinion, reluctantly it may be conceded, that if the opposite of these conditions were the fact, the operation was not skillful.

Our conclusion is that the court erred in withdrawing the question of the defendant's liability from the jury, and that the judgment should be reversed and remanded for a new trial. It is so ordered.

MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16839. Department One. April 13, 1922.]

KATE L. (YOUNG) SMITH, *Respondent*, v. F. G. CRAWFORD *et al.*, *Appellants*.[1]

MORTGAGES (22) — EVIDENCE (164) — ADMISSIBILITY — PAROL TO VARY WRITING—COLLATERAL AGREEMENT. Where an absolute deed, intended as a mortgage, was accompanied by a written collateral agreement which was incomplete in that it failed to make any provision for the disposition of the property at the end of the two years it was to run in case neither of the parties had made sales, oral evidence of the agreement of the parties is admissible to show that the transaction was intended as a mortgage.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered May 21, 1920, upon findings in favor of the plaintiff, in an action in ejectment, tried to the court. Affirmed.

Vance & Christensen, for appellants.

Troy & Sturdevant, for respondent.

[1]Reported in 205 Pac. 1050.

FULLERTON, J.—The appellant F. G. Crawford and the respondent, Kate L. Smith, are brother and sister. On September 19, 1917, the respondent (then Kate L. Young) was the owner of lots one and two, of block four, in Wright's Central addition to the city of Olympia. At this time the property was subject to a mortgage in a sum something less than two thousand dollars, and the respondent was then indebted to her brother in another considerable sum for money loaned her by him and for money advanced by him to her use. The mortgagee was pressing for payment, and the respondent appealed to her brother to protect the property from foreclosure. This he agreed to do. The respondent thereupon conveyed to him the property, with other lands, by a deed in form absolute, with covenants of warranty, and at the same time and as part of the transaction, entered into with him the following separate written agreement:

"This agreement made and entered into this 19th day of September, 1917, by and between Kate L. Young, of Olympia, county of Thurston, state of Washington, and F. G. Crawford of Menle, county of Pacific, state of Washington, party of the second part,

"Witnesseth: That the party of the second part agrees with the party of the first part for and in consideration of the following, to wit:

"That the party of the first part, Kate L. Young, makes and conveys a deed to the party of the second part, F. G. Crawford, the following described property:

"All of that part of the Austin E. Young Homestead Claim belonging to Estate of Theodore D. Young, deceased, in Section 2 (two) T. P. (16) sixteen N. R. 3, W. W. M. Also

"The S ½ of the N. W. ¼ and N ½ of the S. W. ¼ of Sec. (19) nineteen, T. P. seventeen (17) N. R. 2 W. W. M.

"Also Lots One (1) and two (2) of Block Four (4)

Wright's Central Addition to the city of Olympia, state of Washington. Also lots one (1) to eighteen (18) inclusive of Block thirteen (13) of Union Subdivision of Ayer's Addition to the city of Olympia as shown upon the plats now on file in the office of the Auditor of Thurston county, state of Washington.

"The said F. G. Crawford shall upon the payment by the said Kate L. Young out of the sales of any part of the above described property made by either of the above named parties, upon the indebtedness of said Kate L. Young, or the Estate of Theodore D. Young, deceased, or all of the indebtedness of the said Kate L. Young and the Estate of Theodore D. Young has been satisfied and any remainder of the above property or proceeds from the sales of the above property in moneys or securities remaining above the indebtedness of the above land and estate, shall be conveyed and transferred to the said Kate L. Young and her heir and assign, any time on or before the expiration of two years from date of this agreement."

At the time of the execution of the instruments, the respondent was personally residing on the property. Later on she took up her residence elsewhere, continuing, however, to exercise dominion and control over the property by leasing it to tenants, and collecting the rentals derived therefrom. She did not repay to her brother the amount advanced by him to take up the mortgage mentioned, nor did she pay the other indebtedness which she owed him. At the expiration of the two-year period mentioned in the separate agreement, the appellant contracted to sell the property to his coappellants, Howey, and finding the property temporarily vacant, put them in possession thereof.

The respondent thereupon instituted the present action to recover possession of the property. The pleadings were so framed as to put the title of the property in issue. The cause was tried to the court

sitting without a jury. The court, among other findings, found:

"That it was agreed between the parties that the deed of the premises involved in this action to the said defendant F. G. Crawford was one for security of an indebtedness from the plaintiff to the said defendant and was intended as a mortgage only, and the court finding such to be the case from the written agreement for defeasance set forth herein, together with the other testimony submitted and received by the court, therefore finds that such deed was a mortgage and not a deed, and that no action has been commenced to foreclose the same."

From the facts found, the court concluded that the respondent was entitled to recover the property, and entered a judgment accordingly.

The appellant took no exceptions to the findings of fact; in effect conceding that, if the evidence on which they are based is properly in the record, there is not a preponderance of evidence against the findings. His counsel argue, however, that the court in the admission of evidence violated the parol evidence rule. They concede that, in this jurisdiction, parol evidence is admissible to show that a deed absolute in form was intended only as security for a debt, and thus in effect a mortgage; but they contend that the rule is inapplicable to a deed the purpose and intent of which is expressed and defined in a collateral writing executed at the time of the execution of the deed and as a part of the transaction. The argument is forceful, and were the collateral agreement in this instance complete in itself, it might be difficult to find a satisfactory reason for an opposing conclusion. But this writing is not complete in itself; its most glaring defect being that, while it provides for sales of the deeded property by either of the parties thereto, and for the ap-

plication of the proceeds of the sales to the indebtedness of the respondent, it makes no provision for a disposition of the property in the case (the actual happening here) that neither of the parties make sales thereof. The writing being thus incomplete, neither party was estopped by the parol rule from showing the true nature of the transaction.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16836. Department One. April 14, 1922.]

THE STATE OF WASHINGTON, *on the Relation of P. C. Lennon, Respondent,* v. J. Y. C. KELLOGG *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS (66) — EMPLOYEES — REMOVAL — CIVIL SERVICE RULES—REVIEW. Where a discharged city employee in civil service fails to demand an investigation by the civil service commission within ten days, as required by the city charter, the courts cannot inquire into the discharge or order his reinstatement.

Appeal from an order of the superior court for King county, Ronald, J., entered August 31, 1921, directing the investigation of the cause for the discharge of a civil service employee, etc., by the civil service commission. Reversed.

Walter F. Meier and *Frank M. Preston,* for appellants.

Thorwald Siegfried and *Eimon L. Wienir,* for respondent.

FULLERTON, J.—On December 21, 1920, the relator, Lennon, was, and for some time prior thereto had

[1]Reported in 205 Pac. 843.

been, an employee of the city of Seattle in its classified civil service. On the date given he was operating, as motorman and conductor, one of the cars of the city's street railway system, and while so operating the car brought it into collision with another car of the city. For this act he was, on the next day, discharged from his employment by the city's superintendent of railways. The superintendent immediately notified the civil service commission of the discharge, stating in his notification the reasons therefor. On the day following, December 23, 1920, the civil service commission sent to the relator a notice of discharge, stating in the notice the reasons given therefor, and accompanying it with a copy of the provisions of the city charter and the civil service rules relating to the discharge of employees and the rights of discharged employees thereunder.

These, after providing that an employee in the classified civil service of the city may be removed by the appointing power, provide that any employee so removed may, within ten days after such removal, demand an investigation by the civil service commission, whose duty it shall be, if such demand be made, to make an investigation of the cause assigned for the removal and certify its finding and decision to the appointing officer; further providing that, if the removal is not sustained thereby, the employee shall be at once reinstated, but if sustained, the dismissal shall be effective from the date of the action of the appointing officer. The charter and rules also provide for a hearing before the commission in which the discharged employee may be heard personally and by witnesses.

The relator made no demand for an investigation by the civil service commission within the ten-day period. He did, however, but whether within the ten-day period

or not does not appear, make complaint to the superintendent of railways of his discharge. That officer made a further investigation of the matter, and on January 10, 1921, reinstated the relator as conductor, but gave him "to understand that he could not work as an operator from that time on," and notified the commission of his action by letter under date of January 13, 1921, in which he expressed the wish that the commission would concur in his action. The commission, however, refused to so concur, and the relator was again discharged on March 23, 1921.

The relator thereupon instituted proceedings in mandamus in the superior court of King county against the civil service commission, praying a writ requiring the commission to permit the relator to return to the use and enjoyment of his employment, require the commission to investigate the cause of his discharge, and to annul the same upon their records. In obedience to the alternative writ of mandate served upon them, the commission appeared and both demurred and answered to the petition for the writ. On the pleadings, which show the foregoing facts, the court determined that the relator was entitled to an investigation into the cause of his discharge, and entered an order directing such investigation to be made; further ordering that, if the removal be found to be without cause, the relator be at once reinstated to his former position. From this order the commission appeal.

We cannot think the order of the court justified. The city charter of the city of Seattle and the rules of its civil service commission provide an orderly procedure by which a discharged employee of the city may have the cause of his discharge investigated. The courts have no power or authority to alter or amend this procedure. They cannot inquire into the justice of the employee's cause, nor inquire whether the

grounds upon which a discharge is based is well or ill-founded, unless it be in an extreme case, of which this is not one. Its power is confined to the inquiry whether the officers empowered to make the discharge have in so doing acted within the prescribed rules. Here there was no departure from the rules. The relator neglected to pursue the prescribed procedure and pursued one not prescribed. He has thereby brought about a situation from which the courts are powerless to relieve him.

The order is reversed, and the cause remanded to dismiss the proceedings.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16869. Department One. April 14, 1922.]

PAUL BASSEN *et al., Respondents,* v. S. J. ANDREWS, *Appellant.*[1]

BILLS AND NOTES (142)—ACTIONS—EVIDENCE—SUFFICIENCY—PAYMENT. Findings that a note was not paid will not be disturbed on the conflicting evidence of the two parties, where it appears that the defendant denied making the note, but at the trial admitted the making and extension of time, and that he destroyed it when it was presented, claiming that the only dispute was about interest, while plaintiff's conduct and testimony were consistent throughout and to the effect that defendant had seized and destroyed the note, as charged by the plaintiff at the time in the presence of a police officer.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 23, 1921, upon findings in favor of the plaintiffs, in an action on a promissory note, tried to the court. Affirmed.

Jay C. Allen (E. W. Howell, of counsel), for appellant.

Houser & Davis, for respondents.

[1]Reported in 205 Pac. 1047.

FULLERTON, J.—The respondents, Bassen, instituted this action against the appellant, Andrews, to recover a money judgment. In their complaint they alleged that, on June 3, 1919, they sold to the appellant certain described real property, for a consideration of three thousand five hundred dollars; that three thousand dollars of the consideration was paid in cash, and a note for five hundred dollars, bearing six per cent interest, due in one year, was given to evidence the deferred payment; that, on the due date of the note, it was presented to the appellant for payment; that the appellant then stated that he did not have the cash with which to pay the note and asked that the time of payment be extended one month; that the extension was granted on the condition that the interest then due be paid, which interest was paid two days thereafter, the respondent Paul Bassen executing a receipt acknowledging the payment; that, at the expiration of the extension period, the respondent again presented the note for payment, at which time the appellant stated he would pay it on the sixth of the month, some three days later; that the note was again presented to the appellant on the sixth day of the month by the respondent Paul Bassen, when the appellant, under the pretense of examining it, took it from the respondent's hands and destroyed it, refusing then and thereafter to pay the note or the amount thereof. The prayer was for the amount of the note with interest.

Answering the complaint, the appellant admitted the purchase of the property, but denied each and every other allegation contained in the complaint.

The cause was tried by the court sitting without a jury, and resulted in a judgment in favor of the respondents.

The contention in this court is that the evidence preponderates against the conclusion of the trial court,

but after a careful examination of the evidence we do not feel warranted in disturbing its findings. The respondents' case rests largely, it is true, on the testimony of Paul Bassen, but his conduct and his testimony has been consistent throughout. As much cannot be said of the appellant. In his answer he denied even the making of the note, while in his testimony, he admitted the making, the extension of time of payment, the payment of interest, and the destruction of the note; testifying that he paid the principal of the note at the time of its last presentation, and that the difficulty between himself and Bassen arose over the fact that he refused to pay interest on the principal sum for the time of the extension. Pleadings are, of course, prepared by counsel, and are necessarily couched in counsel's language rather than in the language of the client. But the pleadings usually reflect the claims of the client, and if in this instance the appellant had stated truly to his counsel the nature of his defense, it is hard to believe there would have been such a radical difference between his pleadings and his proofs; it carries the inference that there has been a change of front. The circumstances occurring at the time of the last presentation of the note also support the respondent rather than the appellant. After the destruction of the note, the respondent went out and brought in a police officer, and in the officer's presence accused the appellant of destroying the note without paying it. The appellant again asserted that he had paid the note, and produced to the officer the receipt showing the payment of the interest a month before as proof of the payment. The officer would not say that the appellant directly stated that he had paid the principal of the note at the time of the interest payment, but testified that such was the impression he gathered

from the appellant's statement and conduct. On the other side, there is nothing but the naked testimony of the appellant to support his claims.

The trial court had the superior advantage to judge of the truthfulness of the testimony of the witnesses, and, in instances of this sort, we feel that such an advantage ought to be controlling.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16840. Department One. April 14, 1922.]

A. J. KOTKINS *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS (479)—TORTS—DEFECTS IN WATER PIPES—ACTIONS—CONTRIBUTORY NEGLIGENCE. In an action against a city for damages for flooding a basement through the breaking of a water main, the fact that plaintiffs occupied the basement without providing drains as required by an ordinance, would not constitute contributory negligence, precluding a recovery, unless it appears that the want of such drains contributed to the injury.

SAME (479)—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for damages for flooding a basement, provided with a siphon in place of the drains required by ordinance, it is incompetent to show that an administrative officer issued a license to the plaintiff to use such siphon, in violation of the ordinance, as the defense of contributory negligence might thereby be taken out of the case.

Appeal from a judgment of the superior court for King county, Hall, J., entered June 21, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property through the breaking of a water pipe. Reversed.

Walter F. Meier and *Edwin C. Ewing*, for appellant.

Jay C. Allen, for respondents.

[1]Reported in 206 Pac. 11.

BRIDGES, J.—The plaintiffs, as tenants, occupied, among other portions, the basement of the Hambach building, located on Second avenue south, in the city of Seattle. They instituted this action to recover damages to certain trunks and supplies located in the basement, which damage is alleged to have been done as a result of the bursting of a water pipe, through the negligence of the defendant. Judgment in excess of $5,000 was entered on the verdict in favor of the plaintiffs. The defendant has appealed.

The defendant, after denying its own negligence, plead negligence on the part of the respondents because they occupied the basement in violation of Ordinances numbers 22,839 and 36,792, the latter being an amendment to the former. These ordinances provided that particular kinds of drains described in the ordinances should be installed and maintained in all such basements, and that "it shall be unlawful for any person to build, erect, construct, maintain, own, use, occupy, or be in possession of, any yard, cellar, area, or basement or any portion thereof, not provided with a drain or drains as in this ordinance provided, . . ."

The testimony conclusively shows that the basement was not equipped with drains such as the ordinances provide; but, on the contrary, and instead of such drains, a siphon was installed in a well or sump sunk beneath the basement floor at its lowest point. Respondents' testimony tended to show that the bottom of the basement was lower than the sewer in the immediate vicinity, and that drains established as required by the ordinance would not have carried away an accumulation of water in the basement, and that it was necessary to install the siphon for that purpose, and that the siphon was sufficient under any and all ordinary circumstances to prevent the water accumu-

lating in the basement, and that the failure to comply with the ordinances had nothing to do with the damage. Appellant denied all this except the installation of the siphon. On cross-examination by the respondents of one or two of the appellant's witnesses, the court, over the objections of appellant, permitted such witnesses to testify that the city inspector had full knowledge of the conditions above recited, and supervised the installation of the siphon in question, and that some department of the city issued a permit for the installation and maintenance of such siphon.

The appellant takes the position that the failure to have the drains provided by the ordinances was such negligence as prohibited any recovery by respondents. In other words, it contends that respondents had no right, under the ordinances, to occupy this basement unless and until drains, as provided by the ordinances, were installed, and since they were not installed there can be no recovery. We cannot sustain this contention. If it be assumed that the respondents violated the ordinances in occupying the basement, it would not necessarily follow that they could not recover the damage which they suffered. The violation of the ordinances was negligence, but if that negligence did not contribute to the damage, the respondents might recover. A violation of the ordinance defeats recovery only where such violation contributes to the injury. A railroad company is liable for violation of statutes providing that its trains shall give certain signals on approaching a crossing, only where its failure so to do contributes to the injury. One who is injured while violating a speed ordinance or statute may still recover if he shows that his speed was not the cause of and did not contribute to the injury. This doctrine is too well settled to require citation of authorities. Nor is the

rule different where the defendant is the municipality which enacted the ordinance for its own protection and not that of the traveling public. *City of Nashville v. Black,* 142 Tenn. 397, 219 S. W. 1043, 12 A. L. R. 453; *Baker v. City of Portland,* 58 Me. 199, 4 Am. Dec. 274; *Tackett v. Taylor County,* 123 Iowa 149, 98 N. W. 730; *Newcomb v. Boston Protective Department,* 146 Mass. 596, 16 N. E. 555, 4 Am. St. 354; *Ham v. Los Angeles County,* 189 Pac. 462; *Welch v. Town of Geneva,* 110 Wis. 388, 85 N. W. 970; *Anderson v. Wilmington,* 2 Penn. (Del.) 28, 43 Atl. 841; Abbott's, Municipal Corporations, vol. 3, p. 2281; 22 R. C. L. 206, and a full discussion and citation of authorities will be found in the notes to *City of Nashville v. Black, supra,* as reported in 12 A. L. R. 453.

Practically this same question was involved in the case of *Rainier Heat & Power Co. v. Seattle,* 113 Wash. 95, 193 Pac. 233. The facts in that case were very similar to those here. We said:

"As to appellant being guilty of contributory negligence in that it failed to provide drains as required by city ordinances for the carrying off of water, we think that may become a question for the jury upon a new trial, because it might be that the providing of such drains as the ordinances may have required would have carried off the water coming from the burst main and prevented or lessened the damage which resulted to appellant."

We think the court correctly stated the law in one of its instructions where it said that "the defendant would not be liable for any damages resulting to plaintiffs by reason of the absence of drains as provided by said ordinances. If you find that plaintiffs' property would have been damaged, even though plaintiffs had complied with said sections of the ordinances, then plaintiffs would be entitled to recover for any damages

they sustained which was not the result of the absence of drains as provided by said ordinances."

It is our view that it was competent for the respondents to introduce any testimony which tended to show that the failure to install the drains in no wise contributed to the injury which they received.

We think, however, the trial court erred in permitting the respondents to show by cross-examination of one of appellant's witnesses, that some administrative department of the city had issued a license or permit for the construction in this basement of a siphon in place of the drains provided by the ordinance. The city council having determined that drains of a certain character should be placed in all basements, no administrative officer of the city could overrule such legislation and permit drains of any other character to be installed. The case of *Fluckiger v. Seattle,* 103 Wash. 330, 174 Pac. 456, L. R. A. 1918F 780, was very similar to this one. Discussing this question, we there said:

"The act of a city council in passing an ordinance is an expression of the corporate power of the city. That duty, so far as the concern of the public goes, is fully performed when the ordinance is passed, and to permit administrative officers whose duty rests in the police power rather than in the legislative power of the city, to nullify an ordinance by ignoring it or failing wilfully to enforce it, would be to deny to the city council the power to legislate. Such a holding would put the power to veto an ordinance which, from the very nature of things, must be accepted as the true expression of the will of the public, in the hands of an agency having no legislative power or responsibility."

The doctrine of this case is conclusive of the question we are now discussing, and requires us to hold that the testimony of a permit to install the siphon was erroneously received.

Nor can it be said that this testimony was not prejudicial to the appellant. The jury may have concluded that the city had lawfully authorized the installation of the siphon in the place of the drains, and if it did so conclude, then the whole question of contributory negligence for violation of the ordinances would have been out of the case. Respondents cite the case of *Imperial Candy Co. v. Seattle,* 93 Wash. 145, 160 Pac. 303. We there held that where goods located in a basement were injured through the breaking of a water main, contributory negligence could not be attributed to the plaintiff, who was a tenant, from the fact that there was no drain from the basement as required by Ordinance No. 22,839, involved in this action. The ordinances in effect at the time of that decision did not prohibit a tenant from occupying or using a basement which did not comply with the ordinances. Ordinance No. 36,792, providing that it shall be unlawful for any person to occupy any basement which does not comply with the ordinance, was passed subsequently to that decision and evidently to overcome its effect.

Respondents contend, however, that any error committed by the receipt of this testimony was cured, because the court instructed the jury that respondents could not recover if they violated the ordinances and such violation was the proximate cause of the damage. But this instruction was on another branch of the case. It did not pretend to touch the testimony concerning the alleged permit by the city to install the siphon. To clear the record of this error, the court should have told the jury to disregard this permit testimony.

We do not find any merit in the further contention of the appellant that the claim filed by the respondents with the city was not in accordance with the statute and ordinances, because it, in part, fixed the dam-

age as the cost of repair. The claim was properly received by the court.

For the error pointed out, the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 16771. Department One. April 19, 1922.]

ELIZABETH M. BOUNDS, *Respondent*, v. MINNIE E. GALBRAITH, *Defendant*, F. E. LANGFORD, *Appellant*.[1]

EXECUTION (91)—SUPPLEMENTARY PROCEEDINGS—CLAIMS BY THIRD PERSONS. In proceedings supplemental to execution, under Rem. Code, § 620, authorizing an order for the delivery of property "the right to the possession whereof is not substantially disputed," the court cannot require the delivery of money placed in the hands of and claimed by an attorney, advanced to him to cover the cost of and for the purpose of presenting an appeal for the judgment debtor.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 24, 1921, upon findings in favor of the plaintiff, in proceedings supplementary to execution, tried to the court. Reversed.

Lucius G. Nash, for appellant.

Corkery & Corkery and *John M. Gleeson*, for respondent.

TOLMAN, J.—A judgment in this case was entered in favor of the respondent in December, 1920. Execution was issued and returned *nulla bona*. Thereafter, on January 5, 1921, proceedings supplemental to execution were begun, and appellant and others were cited

[1]Reported in 206 Pac. 357.

to appear and answer under oath as to what, if any, property of the judgment debtor was in their possession or under their control. A hearing was had, and thereafter the trial court made findings and conclusions and entered an order thereon to the effect that appellant had in his possession and under his control $225 belonging to the judgment debtor, which sum he was directed to pay to the sheriff. From this order he appeals.

It appears without substantial dispute that appellant, who was the attorney for the judgment debtor in this and other matters, was employed to take an appeal from the original judgment, and estimated that the cost of prosecuting that appeal, with what was already due him from the judgment debtor, would amount to the sum of $1,000. The judgment debtor being without ready means at that time, appellant arranged for one Olsen to advance to him $1,000 for the purpose indicated, and to secure Olsen, one Smead, a son of the judgment debtor, by warranty deed, conveyed to Olsen's son an equity in certain residence property in Spokane, the legal title to which he held. At the time of the hearing below, the appeal from the original judgment was pending in this court, and appellant's services in connection therewith were not completed. The cost thereof had not been and could not then be accurately determined, and the result of the appeal, of course, was wholly unknown. Appellant claimed the right to retain the whole sum of $1,000 to be used for the purpose intended; nevertheless the trial court proceeded to fix an amount which, in his opinion, would be sufficient to cover the costs of the appeal, and pay to appellant a reasonable compensation for his services therein, and the sum so fixed, together with the amount previously due him, appellant was permit-

ted to retain. The overplus is the amount which he was directed to pay to the sheriff.

This being a purely statutory proceeding, our statute upon this subject, Rem. Code, § 620 (P. C. § 7934), seems to be controlling. It reads:

"Where it appears from the examination or testimony taken in the special proceedings authorized by this chapter that the judgment debtor has in his possession or under his control money or other personal property belonging to him, or that one or more articles of personal property capable of manual delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the judge by whom the order or warrant was granted, or to whom it is returnable, may in his discretion, and upon such notice given to such persons as he deems just, or without notice, make an order directing the judgment debtor, or other person, immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order, unless a receiver has been appointed or a receivership has been extended to the special proceedings, and in that case to the receiver."

Assuming that money in the hands of a third person is within the statute, it clearly appears that the right of the judgment debtor to the possession and control of the money in appellant's hands, or any part of it, was substantially disputed, and therefore appellant's rights cannot be determined in this summary proceeding, but only in an action where the proper issues can be framed, all interested parties can be concluded, and where, if proper or desired, a jury trial may be had.

The judgment appealed from is reversed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16890. Department One. April 19, 1922.]

C. C. BEMIS *et al., Appellants,* v. ALFRED E. MEYER *et al., Respondents,* WALKER MOREN *et al., Defendants.*[1]

FRAUDS, STATUTE OF (49) — PART PERFORMANCE — IMPROVEMENTS AND TAKING POSSESSION. A parol partition of lands held jointly by tenants in common is not established, under the statute of frauds, where there was no taking of possession in severalty or the making of permanent improvements.

EVIDENCE (99, 148)—SELF-SERVING DECLARATIONS—TO VARY WRITING—CONTRACT FOR SALE OF LAND. Where co-owners of a tract each listed his interest with a broker for sale at a certain price and neither party had knowledge of the listing by the other, the listing prices were merely self-serving declarations as to the value, and insufficient to overcome a contract reciting that they were equally interested in the contract of sale made by the broker.

TENANCY IN COMMON (1-1)—SEVERANCE—AGREEMENT FOR. Where tenants in common, after severally listing their interests with the same agent, at different prices, entered into a written agreement that they were jointly and equally interested in the sale of the tract, the agreement overcomes indefinite and unsatisfactory evidence of a parol partition between them.

SAME (11)—MUTUAL RIGHTS—ESTOPPEL BETWEEN CO-TENANTS. In an action between tenants in common for an accounting of the purchase price received on the sale of the tract, a tenant who induced the purchaser to make payment of the remainder of the funds to him in violation of the terms of the contract requiring the same to be paid to the escrow holder, cannot complain of a judgment awarding his co-tenant a lien on the land for the whole amount due him.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered July 8, 1921, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Parker, La Berge & Parker, for appellants.

H. J. Snively, for respondents.

[1]Reported in 206 Pac. 566.

TOLMAN, J.—In the year 1919, appellants, Bemis and wife, and respondents, Meyer and wife, under an executory contract, purchased a certain 60-acre tract of land in Yakima county, for $9,000, of which $1,000 was paid down, and the remainder was to be paid in subsequent installments. The purchasers entered into possession, and thereafter, according to the testimony of appellant Bemis, a partition was agreed upon, Meyer making the division and Bemis choosing the tract which he preferred; but there was no evidence as to the taking possession in severalty, or the making of permanent improvements by either; in fact, so far as there was any evidence of any improvements being made, it went only to the building of a small house by Bemis, not upon the tract allotted to him, but by consent, upon the tract allotted to Meyer. Respondents, at about the same time or a little later, individually purchased an adjoining tract of ten acres in which appellants claim no interest.

In July, 1920, respondent Meyer listed with a real estate broker respondents' share of the 60-acre tract, with the crops, and also the 10-acre tract belonging in severalty to respondents, for sale, at a price of $7,700, and on the same day, or within a day or two thereafter, appellant Bemis listed with the same broker appellants' share of the 60-acre tract, with the crops and buildings, at $8,750. It does not appear that either party knew the terms of the listing made by the other, or that there was then or afterwards any agreement as to the division of the purchase price if a sale should be made, except as hereinafter stated. Prior to the 14th day of August following, the broker made a sale to the defendants, Moren and Harris, of the entire property so listed, for a consideration of $18,000, which was in excess of the total of the two listing prices.

Upon being informed that a purchaser had been found, the parties met and prepared a written contract, dated August 14, 1920, in which the appellants and respondents are named as parties of the first part, and the purchasers, Moren and Harris, are named as parties of the second part. By that contract the purchase price is stipulated to be $18,000, of which $3,000 is considered as the purchase price and value of the 10-acre tract belonging to the respondents in severalty, which, of course, leaves a consideration for the 60-acre tract of $15,000. Following the description of the 60-acre tract purchased jointly by appellants and respondents, in the contract with Moren and Harris, these words occur: "Containing sixty acres, more or less, in which the parties of the first part are jointly and equally interested." The contract then provides for the assumption and payment by the purchasers of the unpaid purchase price upon the 60-acre tract; of the mortgage upon the 10-acre tract; of the taxes, and for the sums to be immediately paid, all aggregating $14,467.40, leaving a balance to be thereafter paid of $3,532.60, but is entirely silent as to any division of the purchase price, except as to the 10-acre tract, as hereinbefore stated. The contract also provides for the assignment of the original contract of purchase, running to appellants and respondents, covering the 60-acre tract, and the execution of a deed by Meyer and wife to the 10-acre tract, all to be placed in escrow to be delivered when the balance of $3,532.60 is paid. A certain part of this residue appears to have been paid through disposal of the crops growing upon the land at the time the contract was made, and the balance due from the purchasers at the time of the commencement of this action was $1,752.60, which sum was deposited by them with the clerk of the court to await the outcome of the action.

Appellants brought this action, alleging that a dispute had arisen between them and respondents as to the amount due each; that respondents were claiming an undue proportion thereof, and prayed for an accounting and a determination of the amount due to each of the parties. The trial court took the view that the rights of the parties were determined by the words which we have quoted from the contract, and after making allowance for the 10-acre tract owned separately by respondents, entered a judgment the effect of which was to equally divide between the parties the proceeds of the sale of the 60-acre tract.

Appellants base their contention here largely upon the theory of a parol partition and the respective listing prices. We are firmly of the opinion that the evidence does not go far enough to establish a completed parol partition. To establish a parol partition, good notwithstanding the statute of frauds, there must be something in the nature of part performance, such as the taking of possession in severalty and the making of permanent improvements. As we have already seen, the record discloses nothing of this nature, and under the rule mentioned in *Briggle v. Cox*, 72 Wash. 574, 131 Pac. 209, and the cases there cited, we must hold that no parol partition was here established. The listing prices, neither party having knowledge of, or consented to, the price named by the other, are no more than self-serving declarations. There is nothing in the evidence which convinces us that at any time prior to the execution of the contract to Moren and Harris, or thereafter, was there any oral agreement between the parties in anywise affecting the matter. When the contract was made, it was recognized that Meyer and wife, being the owners in severalty of the 10-acre tract, were entitled to have the price of that tract fixed and de-

termined, and that was specified in the contract. Had there been a partition between the parties it would be equally recognizable that the amount each should receive for his separate holding in what was originally a joint tract should likewise then be determined, but instead of so doing, the parties deliberately recited and wrote into the contract that they were jointly and equally interested in that tract. The indefinite and unsatisfactory evidence as to the partition and as to what was said at various times with reference to the division of the purchase price, cannot be permitted to overcome this plain written declaration.

Some contention is made that the trial court erred in awarding to respondents a lien upon the real estate involved for the full amount found to be due them, which was in excess of the sum paid into court by the purchasers. Ordinarily this contention would warrant further consideration, but in this case it appears that appellants in some manner induced the purchasers to pay directly to them, in violation of the terms of the contract requiring the remainder of the purchase price to be paid to the escrow holder, the sum of $1,500. This being an unauthorized payment under the terms of the contract, made without the consent of the respondents, appellants at least have no reason to complain of the order made.

A motion to dismiss the appeal because of failure to serve notice of appeal upon the defendants, Moren and Harris, was timely made by respondents, but in view of the decision we have reached upon the merits, it need not be considered or discussed.

The judgment appealed from is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16808. Department One. April 19, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES DALE, *Appellant*.[1]

WITNESSES (104, 105)—CREDIBILITY—FORMER CONVICTION—ARREST. Cross-examination of the accused and rebuttal evidence as to a previous arrest of the accused for a distinct offense, not confined to the question of a previous conviction of a crime, is inadmissible under Rem. Code, §§ 1212, 2148, 2290, relating to evidence of a previous conviction and the cross-examination of the accused.

SAME (126-1)—IMPEACHMENT—CONTRADICTION—COLLATERAL MATTERS. Where the state, on cross-examination, explores the subject of a previous arrest of the accused for a distinct offense, it is bound by the answers as upon a purely collateral matter, and it is reversible error to permit the state to introduce rebuttal evidence thereon.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 27, 1920, upon a trial and conviction of being a jointist. Reversed.

W. C. Donovan, for appellant.

William C. Meyer and *M. R. Morton*, for respondent.

TOLMAN, J.—Appellant was tried and convicted upon a charge of being a jointist, and from the judgment and sentence, entered upon the verdict of guilty, he has appealed. Of the many assignments of error, we find it necessary to consider and discuss but one. Appellant offered himself as a witness in his own behalf, and on cross-examination by the state, over the strenuous objection of counsel, he was asked and required to answer the following:

"Q. Fordyce had you arrested down in Adams county when you plead guilty to violating the liquor law too, didn't he? Mr. Donovan: Object to that as not proper cross-examination. The court: You mean

[1]Reported in 206 Pac. 369.

he was arrested—I will sustain the objection. Q. Fordyce arrested you one time when you had about thirty bottles of whiskey in your possession? Mr. Donovan: Object to that as incompetent, irrelevant and immaterial and not proper cross-examination. The court: Objection overruled. Mr. Donovan: Exception. A. Fordyce arrested me, but I didn't have any whiskey. Q. Didn't you have thirty bottles of whiskey in your possession? A. I didn't have thirty drops of whiskey. Q. You didn't have it? A. No, sir."

And on rebuttal the state was permitted to recall the witness, Fordyce, when the following occurred:

"Q. Did you ever arrest Charley Dale prior to the 28th of October? Mr. Donovan: Object to that as incompetent, irrelevant and immaterial, not tending to explain any issue in this case, not proper rebuttal. Mr. Grant: It was brought out on the examination of Mr. Dale. The court: He may answer the question. Mr. Donovan: Exception. A. I did. Q. And where? A. I arrested him once up in the alley right off Washington street between Second and Third avenue while he was delivering thirty-two quarts of whiskey."

The question presented by this state of the record seems to be controlled by our statute. Rem. Code, § 1212 (P. C. § 7723), provides:

"No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon."

Section 2148, Rem. Code (P. C. § 9214), among other things, provides:

". . . any person accused of any crime in this state, by indictment, information, or otherwise, may, in

the examination or trial of the cause, offer himself, or herself, as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses: . . ."

And § 2290, Rem. Code (P. C. § 8725), reads:

"Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto."

Neither the cross-examination nor the rebuttal testimony is confined to the question of previous conviction of a crime, consequently the provision in the section of the statute last quoted, to the effect that the state shall not be concluded by the answer, is not applicable. Since the state was not in any manner attempting to prove a previous conviction, the matter of a previous arrest and the previous possession of whiskey was not made admissible by the statutes referred to, and if admissible at all, which in the light of what was said in *State v. Smith*, 103 Wash. 267, 174 Pac. 9, may well be doubted, was purely a collateral matter upon which the witness could not be impeached under elemental and familiar rules. The state was, in any event, therefore concluded by his answers upon cross-examination, and it was reversible error to permit the introduction of the rebuttal testimony. A careful study of the record fails to convince us that there was any other error of a sufficiently prejudicial nature to warrant reversal;

but for the error pointed out, the case must be, and it is hereby, reversed and remanded for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16949. Department One. April 19, 1922.]

HUB MERCANTILE COMPANY, *Respondent*, v. ALBERT STINGLE, *Appellant*.[1]

APPEAL (151½)—PRESERVATION OF GROUNDS—TIMELY EXCEPTIONS AND MANNER OF TAKING. Exceptions to findings of fact, not taken within five days after notice of the findings, as required by Rem. Code, § 383, will be struck out on motion.

SAME (151½). An application to incorporate exceptions to findings in the record must first be made to the trial court.

SAME (131)—PRESERVATION OF GROUNDS—OBJECTIONS TO FINDINGS. Under Rule 23 of the superior court, requiring three days' notice of the signing of findings of fact, except in case of emergency, the emergency will be presumed where the trial court made findings without notice, especially where no motion was made below to vacate.

SAME (136)—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS. In the absence of exceptions to findings, the facts cannot be considered.

Appeal from a judgment of the superior court for Yakima county, Sessions, J., entered June 2, 1921, upon findings in favor of the plaintiff, in an action on an account, tried to the court. Affirmed.

F. E. Gordon, for appellant.

Rigg & Venables, for respondent.

TOLMAN, J.—This is an action upon an open, running account, covering a period of some five or six years. Judgment was entered, after trial to the court, against the defendant for $643.34, being a sum slightly less

[1]Reported in 206 Pac. 567.

than the amount claimed, from which judgment he appeals.

We are met at the outset by respondent's motion to strike appellant's exceptions to the findings of fact made by the trial court, because not taken in time.

The case was tried on June 1, 1921, and at the conclusion of the trial the court announced that he then saw no reason why the plaintiff should not have judgment as prayed for, but that he would examine the authorities submitted and if he should change his mind would so announce at the convening of court the next morning. Both counsel in the case advised the court that, because of other engagements, they could not attend upon the court the next day, but no different order was asked for or made. Accordingly, on June 2, 1921, the trial court signed findings of fact, conclusions of law and the judgment as indicated, which were duly filed on that day, and copies thereof were, on the same day, mailed to the attorney for the defendant, with notice of such signing and filing. On June 3, the attorney for defendant prepared, served by mailing, and on June 4 duly filed, a motion for a new trial, among the grounds stated being the following:

"That the findings of fact, conclusions of law and judgment were signed by the court as soon as he rendered his decision, and without first presenting the same to the defendant or his attorney and giving the usual and statutory time for presenting the judgment and findings to the court for his signature."

Thereafter, and while the motion for a new trial was still pending and undisposed of, on July 5, 1921, proper exceptions to the findings of fact were filed. Thereafter the motion for a new trial was denied, and by proper steps the case was removed to this court on appeal. Soon after the case was docketed here, respond-

ent filed its motion in this court to strike from the files appellant's exceptions to the findings of fact and conclusions of law because not made within five days after the findings were entered, or within five days after service of notice of the filing thereof as required by Rem. Code, § 383 (P. C. § 7811). Because of a dispute between the parties as to what the record shows or should show, this motion was passed to the merits. The motion was renewed by respondent in its brief, and, as we view it, must now be granted.

Appellant's counsel seeks to avoid this result by the contention (supported by affidavit) that, when at the conclusion of the trial the court announced its views, a request was made, not shown by the record, to the effect that if the court adhered to those views the defendant have exceptions allowed; that counsel supposed that such exceptions had been by the court duly noted and made a matter of record, and relied upon such supposition until the discovery of the true situation, when he immediately caused proper exceptions to be filed. We are now asked to refer the case for the purpose of having the record corrected accordingly. This we cannot do. The affidavit referred to fails to show specific and definite facts which, if made a part of the record, would place upon the trial court the burden of preserving appellant's rights, and, moreover, if such specific facts exist, the application to have them incorporated in the record should first have been made to the trial court. It is also contended that rule 23 of the superior court, to the effect that findings, etc., except in cases of emergency, will not be signed unless a three-day notice has been given to the opposing party, was violated. It is within the discretion of the trial court to determine when an emergency exists, and in the absence of anything to the contrary, it will

be presumed that the trial court properly determined that an emergency existed, if that be necessary to justify the action taken. In any event, there having been no motion below to vacate and set aside the signing and filing (the motion for a new trial not having that effect), the question cannot now be raised.

In the absence of any exceptions to the findings of fact, the only points we may now consider are, the overruling of the demurrer to the complaint, and the exclusion of evidence offered of long prior and wholly independent transactions between the parties. The complaint was in the usual form and sufficient, and the testimony rejected was immaterial. The order must be, therefore, that respondent's motion to strike be granted, and the judgment be affirmed; and in this case such order works no hardship, because an examination of the evidence convinces us that it does not preponderate against the findings of the trial court, and an affirmance would have followed if the motion had not been interposed.

Judgment affirmed.

PARKER, C. J., MITCHELL, and BRIDGES, JJ., concur.

[No. 16960. Department One. April 19, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. ELMER H. TIBBITS, *Appellant*.[1]

CRIMINAL LAW (144)—PRIVATE WRITINGS—DAILY REPORT SLIPS. In a prosecution for embezzlement, a daily report slip which it was the duty of accused to make, is admissible although it was not a complete record of the day's business.

EMBEZZLEMENT (18)—EVIDENCE—SUFFICIENCY. Embezzlement by appropriating money collected by an employee, is a question for the jury where the amount taken was paid by check drawn in the employer's name, endorsed and received by accused, but not reported on the daily slips, and accused claimed to have accounted for the proceeds in another book which the employer testified did not exist.

CRIMINAL LAW (353)—NEW TRIAL—SURPRISE. A claim of surprise, to authorize a new trial, must be made at the time it occurs, or it is waived.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered February 28, 1921, upon a trial and conviction of grand larceny. Affirmed.

J. W. Graves, for appellant.

William C. Meyer and *Chas. H. Ennis*, for respondent.

FULLERTON, J.—This is an appeal from a judgment of conviction on a charge of grand larceny. The appellant, Tibbits, was employed by a partnership firm composed of one Peter Paulus and one Sam Peters, doing business as the Athens Bakery & Grocery Company, to solicit and make sales of the firm's goods to the local trade; a part of his duty being to make collections for the goods sold by him. The specific charge for which he was convicted was the appropriation to

[1]Reported in 206 Pac. 372.

his own use of thirty-one dollars and ninety-two cents, collected from one of the firm's customers on December 16, 1920.

It was the appellant's duty, and was his practice, to make daily reports to the firm of his sales and collections. These were made on slips prepared for the purpose and were turned into the firm at the end of the day's business. As a part of its case, the state offered and was permitted to introduce in evidence the slip returned as representing the sales made on the date above given. Its admission in evidence constitutes the first of the appellant's assigned errors. The objection urged against it is, that it was not a complete record of the day's business transacted by the appellant for the firm; that the evidence showed that certain items of debit and credit were entered in another book kept by the appellant for the firm, and that items of this sort did not appear upon the slips. It is true that the appellant testified that there was another book in which entries of this sort were made, but the evidence of the members of the partnership was to the contrary; their testimony being that these slips contained the only reports made by the appellant. Under these conditions the slip was plainly admissible. Its effect as evidence against the appellant was, of course, for the jury, but it was a circumstance which the jury were entitled to consider in making up their verdict.

The next assignment is that the evidence was insufficient to justify a conviction. It is to this point the argument of the appellant's counsel is mainly directed, but we do not feel that any useful purpose would be subserved by reviewing the evidence at length. The particular sum in question was paid by a check drawn in the firm's name, and there is no dispute that the ap-

pellant endorsed the check and received the money, and that he did not report the collection on the daily slip we have before mentioned. His contention was that it was accounted for in the other book which he described, and which the members of the firm say had no existence. This dispute was within the province of the jury to determine, and the evidence is by no means convincing that they did not correctly determine it.

The appellant called as a witness on his own behalf one Walter Wallace. This witness, in answer to questions put to him by appellant's counsel, testified that he was employed by the appellant to aid in soliciting sales of the firm's goods and was paid for his services by the appellant. In his cross-examination he reiterated the statement, testifying further that he was not employed by the firm to perform the services and was not paid by them for the services performed. The appellant moved for a new trial, and in his supporting affidavit avers that he was surprised at this testimony, and avers further that if granted a new trial he can "establish that the said witness, Wallace, worked on the inside the store of said Athens Bakery & Grocery, during the illness of this affiant." The argument is made that this evidence was highly prejudicial to the appellant, and pending the trial, which was then near its close, he was unable to find controverting evidence. But the appellant's claim of surprise comes too late. Such a claim must be made at the time the surprise occurs, otherwise it is waived.

"A party will not be permitted to sit mute, claim no surprise at the trial, speculate on the verdict, and, when it is found against him, claim the right to a new trial on the ground of surprise." *State v. Schrock*, 92 Wash. 69, 158 Pac. 1005.

See, also, *State v. Gay*, 82 Wash. 423, 144 Pac. 711; *State v. Hodoff*, 88 Wash. 413, 153 Pac. 377.

No reversible error appearing in the record, the judgment will stand affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16855. Department One. April 19, 1922.]

LUTHER WONDER, *Plaintiff*, v. OLYMPIC SMELTERS COMPANY, *Defendant.*

THE STATE OF WASHINGTON, *on the Relation of Harry L. Parr, as Receiver etc., Respondent*, v. GABRIEL WALLIS, *Appellant.*[1]

RECEIVERS (39)—TITLE AND POSSESSION OF PROPERTY—REMEDIES OF RECEIVERS—CONTEMPT PROCEEDINGS. Where an officer of a corporation, after appointment of the receiver, wrongfully came into the possession of a government warrant belonging to the insolvent corporation, and cashed it and failed to forward the proceeds to the receiver, he can be compelled to do so in contempt proceedings; and it is no defense that, since the contempt proceedings were instituted, third persons claiming an interest therein had brought suit to recover the same; since the order in contempt will be a complete defense to the action.

Appeal from an order of the superior court for Thurston county, Wright, J., entered July 7, 1921, directing the payment to a receiver of property belonging to an insolvent corporation, after a hearing before the court. Affirmed.

Gordon & Nolte, for appellant.

Thos. L. O'Leary, for respondent.

PER CURIAM.—The Olympic Smelters Company is a corporation organized under the laws of the state of Washington, having its principal place of business at Olympia, in Thurston county. On September 15, 1919,

[1]Reported in 206 Pac. 360.

at the suit of Luther Wonder, instituted in the superior court of Thurston county, the corporation was adjudged insolvent and one Harry L. Parr was appointed receiver thereof. At the time of the adjudication of insolvency and the appointment of the receiver, the corporation had a claim pending before the Department of the Interior of the government of the United States for damages arising from some act of the government during the late war, the precise nature of which is not shown. In August, 1920, the Interior Department allowed the claim for the sum of $5,437.05, and soon thereafter forwarded its warrant to the smelter company for the amount so allowed. For some reason not explained, the letter enclosing the warrant was not delivered to the smelter company, nor to Parr, its receiver, and was returned to the department. Later on the appellant, Wallis, who was vice-president of the smelter company, learned of the issuance of the warrant, caused the same to be forwarded to him, indorsed and cashed it, and failed to forward the money received thereon to the receiver, or even notify him of its receipt. The receiver learned of its receipt through other sources and made demand upon the appellant for it. This demand was refused, whereupon the receiver, on May 27, 1921, instituted the present proceedings against the appellant, Wallis, seeking to require him to turn over to the receiver the proceeds of the warrant. The proceeding was in the form of a petition, citing the appellant to turn over to the receiver the proceeds of the warrant, otherwise to show cause why he should not be punished for contempt.

In response to the citation, the appellant demurred to the jurisdiction of the court, and to the sufficiency of the facts set out in the petition. The demurrer was overruled, whereupon he made return, setting forth

that the sum held by him was claimed by third persons, none of whom were parties to the proceedings. After a partial hearing on this return, the cause was continued for a further return and counter-showing. Subsequently the appellant made a further return, setting out that a suit was pending in the superior court of Pierce county wherein A. W. Spike was plaintiff and the appellant, with others, including the corporation and the receiver, were defendants, in which the plaintiff claimed an interest in the fund. The appellant further returned that he stood at all times ready and willing to dispose of the fund in accordance with an order and decree of a court of competent jurisdiction.

At the conclusion of the hearing, the court made an order requiring the appellant to pay the proceeds of the warrant to the clerk of the superior court of Thurston county within thirty-six hours after service of the order upon him, failing in which an order was directed to be issued for the arrest and imprisonment of the appellant until he should comply therewith. The appeal is from this order.

For reversal, the appellant relies upon the case of *State v. Denham,* 30 Wash. 643, 71 Pac. 196, but the difference in the facts, we think, differentiates the cases. In the cited case, the defendant was, at the time of the appointment of the receiver, in possession of property claimed by a third person, to whom the defendant would be answerable if he wrongfully delivered it to another. The receiver, relying on a general order made at the time of his appointment requiring all persons having property in their possession belonging to the corporation to turn it over to the receiver, made demand on the defendant for the property. The defendant, under the advice of counsel, refused to deliver it to the receiver, wherefore contempt

proceedings were instituted against him. To the citation he appeared by counsel, who raised questions going to the form of the procedure and the jurisdiction of the court. These were overruled and, without further proceedings, a fine was imposed on the defendant. There was no specific order of the court directing the defendant to turn over the particular property, nor order at all, except the general order mentioned, and an opportunity was not given the defendant to show to whom the property rightfully belonged. But here the appellant came into possession of the money after the appointment of the receiver, and under circumstances which it is charitable to characterize as wrongful. He does not himself claim any right to the money. His sole defense is that the property is claimed by others, and that one of such claimants has instituted an action against him to recover a part of the money. But the claims, whether valid or otherwise, do not justify the withholding of the money by him from the person rightfully entitled to its possession. The order of the court requiring him to turn the money over to the receiver will be a valid defense to any action the claimants may institute against him. Nor does the pending action have any greater effect. It involves the same property and was instituted after the institution of the proceedings by the receiver. The courts in which the separate proceedings are pending are of coordinate jurisdiction. The jurisdiction of one court over the subject-matter of an action cannot be ousted by the institution of a suit over the same subject-matter in a court of coordinate jurisdiction. As a defense to the later action the defendant has but to plead the judgment entered in the first court, or, if judgment has not been entered, the pending of the action therein.

The appellant has submitted no argument on the question of the jurisdiction of the Thurston county

court, and we shall not ourselves discuss the question. It is sufficient to say that we see no reason why the proceeding instituted is not cognizable in that court, nor why the appellant is not subject to its jurisdiction.

The order will stand affirmed.

[No. 16746. Department One. April 21, 1922.]

FRANK H. MADDEN, *Respondent*, v. THE NIPPON AUTO COMPANY *et al.*, *Appellants*.[1]

EVIDENCE (216, 217) — OPINION EVIDENCE — CROSS-EXAMINATION — VALUE OF PROPERTY. An opposing party is entitled, on cross-examination, to inquire into the factors taken into consideration by the witness in arriving at his estimate of the value of an automobile, injured in an accident, especially where the witness stated two elements taken into consideration in arriving at his estimate as the cost of repairs and general depreciation in value.

SAME (48)—COMPETENCY—VALUE OF PROPERTY—COSTS OF REPAIRS. In an action for damages to an automobile, it is error to exclude evidence of the cost of repairs and the purchase price obtained in a sale after the repairs, since they are elements tending to show its value after the damage.

Appeal from a judgment of the superior court for King county, Brinker, J., entered March 15, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to an automobile sustained in a collision. Reversed.

Van Dyke & Thomas, for appellants.

Roberts & Skeel and *N. A. Pearson*, for respondent.

FULLERTON, J.—The automobile of the appellant and the automobile of the respondent, while being driven on a public street in the city of Tacoma, collided, in-

[1]Reported in 206 Pac. 569.

juring both automobiles. The respondent, charging the fault to the appellant's driver, brought this action to recover in damages. The jury returned a verdict in his favor in the sum of fifteen hundred dollars, and from the judgment entered on the verdict, this appeal is prosecuted.

The first assignment of error discussed in the appellant's brief is that the court too narrowly restricted the cross-examination of the respondent's witness who testified on the question of damages. The respondent called a Mr. Folts, who testified that he had been for a number of years the director of sales in an automobile concern, dealing in automobiles of the make and style of the respondent's automobile, and that he had seen the automobile both before and after the accident and knew its values at these respective times. He further testified that, immediately prior to the accident, the value of the automobile was between forty-five hundred and forty-eight hundred dollars, and that, immediately after the accident, its value was between twenty-five hundred and twenty-seven hundred and fifty dollars. On cross-examination he was asked what elements he took into consideration in making up his estimate of the value of the car after the accident. He answered that the principal elements were the cost of repairing the automobile, and its reduced sale value after the repairs were made; explaining the latter element by saying that an automobile which has been injured in an accident and repaired has not the same value in the eyes of an intending purchaser as one not so injured, even though there may be no visible marks of the injury on the automobile. He was then asked what allowance he made in his estimate for the cost of repair of the automobile, and what allowance he made for the more general depreciation in value. To these questions, objections were interposed and sustained.

In sustaining the objections, it is our opinion the court erred. The testimony of the witness as to the value of the automobile after the injury was at best only an estimate. The opposing party was clearly entitled to inquire into the factors he took into consideration in making the estimate, and, since he gave more than one, we think it equally clear that it was entitled to inquire into the estimate he put upon each separate factor. Let it be supposed, for illustration, that the witness had testified that he estimated the cost of repair at a certain sum and the loss in sale value at another certain sum, and that the appellant had been able to show that the actual cost of repair was less, or that the sale value was greater, than the estimated sums, would any one say that the value of the testimony of the witness had not been lessened in the minds of the triers of the fact? We think not. To lay a foundation for contradictory testimony is a legitimate purpose of cross-examination. We are not unaware, of course, that cross-examination into matters of this sort can be abused—that the cross-examination can be carried to such an extent as to become harassing rather than enlightening—but here there is no question of this sort. The objection was not sustained on the ground that counsel was abusing his privileges, but on the ground that the matter was not a legitimate subject of inquiry.

In support of its own case on the question of the amount of the damages suffered by the automobile, the appellant offered to show the actual cost of repairing it, its subsequent sale, and the price received for it at such sale. Objection was interposed and sustained to the testimony, and this ruling furnishes the foundation for the appellant's second assignment of error. If we are correctly advised the court based its ruling upon the case of *Alexander v. Barnes Amusement Co.*,

105 Wash. 346, 177 Pac. 786, in which we held that the measure of damages for injuries to personal property, where the property was only partially destroyed, was the difference between the market value of the property immediately before and immediately after the injury; the trial court construing the case to mean that the only testimony competent to prove such values was the opinions of witnesses having expert knowledge in such matters. But if this be the ground of the holding, the trial court has misconstrued our meaning. We did not there deny, nor intend to deny, the right of either party to resort to any legitimate evidence to show the relative values. In the case of an automobile, many injuries are of such a nature that they can be made whole by repairs. The value of the automobile after the injury would in such an instance necessarily be the value of the automobile before the injury, less the cost of the repairs, plus the value of the use of the automobile during the time it takes to make the repairs, and in such a case no other showing need be made to prove the damages. In more serious injuries other elements enter into the question when the cost of repair and loss of use will not measure the total amount of the loss; such, for example, the element which the witness before mentioned cited, the loss of sale value arising from the mere fact of the injury. But when the cost of repair is one element of damage, clearly it can be shown when known. So, also, when sale value is one of the elements, the price received on the sale of the article is evidence of its sale value; not conclusive, it is true, but an element to be considered in ascertaining the sale value. See *Abrahamson v. Cummings,* 65 Wash. 35, 117 Pac. 709; *Carnego v. Crescent Coal Co.,* 164 Iowa 552, 146 N. W. 38, Ann. Cas. 1916D 794, and note to the case where reported in Ann. Cas. 1916D 794. So here, as evidence tending to show the value of this auto-

mobile after its injury, it was competent to show the costs of its repair and the price for which it was sold after the repairs, and it was error to exclude the testimony.

The court, among other instructions, gave the following:

"The court instructs the jury that if you find that on or about the 21st day of February, 1920, the plaintiff's automobile was damaged by the automobile of defendant while operated by its agent, and that such injury resulted directly from the want of ordinary care and prudence of the agent of the defendant, and not from want of ordinary care and prudence on the part of the plaintiff, directly contributing to the injury, then the plaintiff is entitled to recover."

The proof showed that the respondent's (plaintiff's) automobile was at the time of the accident being driven by his employee and not by the respondent himself. It is objected to the instruction that it is misleading, and subject to misconstruction by the jury. The instruction is faulty in that it did not note the distinction indicated, but we shall not inquire whether the fault is of such a nature as to require a new trial. Since a new trial must follow because of the errors already noticed, it is mentioned lest otherwise it be deemed approved, and given in the same form on the new trial.

The judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., BRIDGES, and TOLMAN, JJ., concur.

MITCHELL, J., concurs in the result.

[No. 16798. Department One. April 21, 1922.]

The State of Washington, *Respondent*, v. Thomas V. Carroll, *Appellant*.[1]

Criminal Law (350)—New Trial—Communication by or with Jurors. Misconduct of the bailiff in sending a communication to a member of the jury while deliberating on its verdict, contrary to Rem. Code, § 349, will not require a new trial where it appears that the communication was a nonprejudicial note from the juror's wife.

Witnesses (126-1)—Cross-examination—Impeachment—Collateral Matters. Upon cross-examination of the accused's wife to impeach her evidence as to the exemplary character of the accused, her denial of a statement that he had committed other acts for which he could be sent over the road is a collateral matter binding on the state, and it is error to permit rebuttal thereof by the evidence of another witness.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 25, 1921, upon a trial and conviction of incest. Reversed.

John F. Dore and *E. E. Shields*, for appellant.

Malcolm Douglas, Ralph Hammer, and *John D. Carmody*, for respondent.

Bridges, J. — The defendant has appealed from a judgment of sentence entered upon a verdict of the jury finding him guilty of the crime charged in the information. The following facts appear in affidavits made in support of and against appellant's motion for a new trial: While the jury was deliberating on its verdict, the wife of one of the jurors handed to the bailiff having charge of the jury a written note to be delivered to her husband. Before delivering the note, the bailiff read it, and the affidavits show that its wording or substance was as follows: "Am going to get a

[1]Reported in 206 Pac. 563.

bite to eat downtown and then go to a movie. M." The affidavits of both the juror and his wife are to the effect that the note had no secret meaning, or any other meaning than that which plainly showed upon its face. Section 349, Rem. Code (P. C. § 8513), reads as follows:

". . . The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, . . ."

While it is plain the bailiff violated the statute, it does not necessarily follow that there was a mistrial. There is absolutely nothing to show that the appellant was prejudiced because of the note which was given to the juror. In fact, it affirmatively appears that there was not, and could not have been, any prejudice. Under such circumstances, we will not disturb the order of the court in refusing to grant a new trial. *State v. Smokalem,* 37 Wash. 91, 79 Pac. 603; *State v. Aker,* 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; *State v. Pepoon,* 62 Wash. 635, 114 Pac. 449; *State v. White,* 113 Wash. 416, 194 Pac. 390.

While we refuse on this ground to grant a new trial, we wish to say that the bailiff was guilty of misconduct, and his action is certainly to be condemned. Such thoughtless acts by those in charge of jurors are dangerous and very often lead to errors which must force a new trial.

The appellant's wife was a witness in his behalf. In her direct examination she had asserted that she did not believe her husband was guilty of the crime charged against him because, among other reasons, he was a man whose conduct was most exemplary. On cross-examination, the prosecuting attorney, over objections by the appellant's counsel, and apparently in

an effort to break down or impeach her testimony concerning her husband, sought to show by her that her husband had been guilty of other offenses. One of the questions addressed to her was: "Q. Now, at that time didn't you say to Mrs. Drew this, or in substance this: 'Mrs. Drew, he has done other things, and if people knew it they would send him over the road for it.' ?" This question she answered in the negative. We do not find it necessary to decide whether this manner of cross-examination was error. After the appellant had rested his case, the prosecuting attorney called Mrs. Drew in rebuttal, and, after some preliminary questions, asked her: "Q. Now, tell the jury whether or not during that conversation Mrs. Carroll (the appellant's wife) said to you this or this in substance: 'He (meaning the appellant) has done other things, Mrs. Drew, and if the people knew about them they would send him over the road.' ?" Over appellant's objection, the court permitted the witness to answer that Mrs. Carroll had so spoken to her.

We have no doubt the court erred in not sustaining the objection to the question. All this matter touched a collateral issue, and the state was bound by the answer given by Mrs. Carroll. The correct rule is laid down in 28 R. C. L. 613, as follows:

"The rule is firmly established that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue. Or, as it is frequently stated, an answer by a witness upon cross-examination, upon a merely collateral matter, cannot be contradicted. If he be asked as to a collateral fact, his answer is conclusive on the party examining him, . . ."

In the case of *State v. Carpenter,* 32 Wash. 254, 73 Pac. 357, we said:

"No rule is better settled than the one that a cross-examining party is concluded by the answer which a

witness makes to a question pertaining to a collateral matter. To such answers no contradiction is allowed, even for the purpose of impeaching the witness."

In the case of *State v. Stone,* 66 Wash. 625, 120 Pac. 76, the state was permitted to cross-examine the appellant's wife, for the purpose of impeachment, concerning alleged conversations held by her with a certain collector. She answered that she had had no such conversations, and the state, in rebuttal, produced the collector, who testified that such conversations were had. We held that the admission of this testimony was error. See, also, *Wharton v. Tacoma Fir Door Co.,* 58 Wash. 124, 107 Pac. 1057; *State v. Ross,* 85 Wash. 218, 147 Pac. 1149.

For the error stated, the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., FULLERTON, and TOLMAN, JJ., concur.

MITCHELL, J., concurs in the result.

[No. 16891. Department Two. April 21, 1922.]

ALECK ALEXIS *et al., Respondents,* v. HATTIE S. PITTINGER *et al., Appellants.*[1]

LANDLORD AND TENANT (60)—INJURY TO PREMISES BY LANDLORD—NEGLIGENCE—DEFENSES. The fact that blasting on leased premises was done by an independent contractor, employed by the landlord to do the blasting, is no defense to the tenant's action for damages to the demised premises, and disturbing the tenant's quiet possession thereof; especially where the operations were supervised by the landlord, and were wilfully designed to disturb the tenant.

SAME (60)—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a landlord reserves the right to clear uncleared portions of the land leased, the fact that the usual and customary method was by blasting with stumping powder would not justify the negligent and wanton use of excessive charges of powder in such a manner as to

[1]Reported in 206 Pac. 370.

unnecessarily injure, damage and deprive a lawful tenant of peaceable possession of the premises not being cleared.

NEW TRIAL (25)—GROUNDS—EXCESSIVE DAMAGES. It is not an abuse of discretion for the trial court to deny a motion for new trial based on excessive damages due to passion and prejudice in an action for damages to buildings and business by blasting stumps, where the jury returned a verdict of $700 and the evidence would justify a larger verdict on the basis of loss of profits alone.

Appeal from a judgment of the superior court for Clarke county, Blake, J., entered June 10, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages. Affirmed.

W. G. Drowley and *McMaster, Hall & Schaefer,* for appellants.

Chas. S. Lane, for respondents.

HOLCOMB, J.—Respondents in this action sought to recover damages on two causes of action in the total sum of $3,000.

In their complaint they allege as a first cause of action that they leased certain lands from appellants, and that appellants wrongfully evicted them from a portion of the lands so leased, to their damage in the sum of $2,000.

In the second cause of action, they allege that appellants disturbed their possession of the premises by blasting trees thereon and damaging certain chicken houses and respondents' chicken business by such blasting, to their damage in the sum of $1,000.

Appellants in their answer admit the execution of the lease, but deny that they evicted respondents from any portion of the leased premises, and deny that they disturbed respondents' possession of the premises by blasting.

The jury returned a verdict upon the two causes of action in the total sum of $700. Motion for a new trial was denied and judgment entered upon the verdict.

Twelve assignments of error are urged in three groups, and may be summarized as follows: First, that the clearing of trees and the blasting complained of was done by a man named Smith, who was an independent contractor, and appellants were not responsible for any damage he may have caused. Second, that in reserving the right to clear the uncleared portions of the leased land, appellants are excused from any damage resulting, providing only that they used the usual and customary methods of land clearing generally employed in that vicinity. Third, that the evidence does not justify the amount of the verdict rendered.

As to the first question, under the evidence, Smith was not such an independent contractor as would excuse appellants. Appellants were the lessors, granting to respondents as lessees peaceable and quiet possession and enjoyment of the demised premises, with certain reservations in themselves. Smith testified that he was hired to do the work. Whether he was hired as a laborer or given a contract for the job or by the acre is immaterial, since he was employed by appellants to go upon the premises and directed to do exactly what he did.

The case is very similar to that of *Wusthoff v. Schwartz,* 32 Wash. 337, 73 Pac. 407, where we said:

"Respondent further insists that it appears that the work was to be done by contractors, and that they were instructed by her not to begin it until appellants had consented; that, if they did not get such consent, they alone are responsible, and that she cannot be held liable for their misconduct. The contractors were, in any event, the agents of respondent, and as such were authorized to do the work. There is no evidence that appellants had notice that the contractors had disregarded respondent's instructions. The agents were sent to the premises to do the very things which they

did. They were done within the apparent scope of their authority, and in the absence of any notice to appellants as to the extent thereof. The acts therefore became, as to these appellants, those of the principal."

And again in *Bancroft v. Godwin*, 41 Wash. 253, 83 Pac. 189, citing *Wusthoff v. Schwartz, supra*, we adhered to the same principle and said:

"When he undertook to remodel said building, it was incumbent upon him to see that said modification was accomplished in such a manner as not to damage the goods of his tenant, or in any way seriously interfere with the beneficial enjoyment of the tenancy created by said lease. Having, however, caused this remodeling to be undertaken, and not having supervised it so as to avoid impairing his tenant's property and substantial rights, he became liable in damages for the injury thereby wrought."

The latter observations apply peculiarly to the facts in this case. It is shown here that appellants were present and supervising a good deal of the time during the clearing and blasting operations, appearances being that the operations were wilfully designed to disturb respondents. Blasting was commenced within 150 feet of respondents' large chicken house, and large rocks, portions of trees and dirt were cast thereon, many of which made holes through the roof and caused other damages as shown by the evidence.

By the terms of the lease, appellants reserved the right to clear uncleared portions of the land. They offered to prove that the ordinary and usual and proper way of clearing land in that vicinity was by blasting with stumping powder.

As to this, the evidence shows that, with ten or twelve acres of uncleared land, appellants chose to begin blasting operations within 150 feet of respondents' buildings; that whole trees were blown out and that excessively large charges of powder, amounting

to 15 or 16 sticks to the tree, were used, and that debris was cast all over the cleared land and buildings of respondents. Though it might be admitted that the usual and ordinary method of clearing land of trees in that vicinity was by blasting them with stumping powder, no usual and customary method could justify the negligent or wanton use of excessive charges of stumping powder or dynamite and the clearing of the land in such a manner as to unnecessarily injure, damage and deprive a lawful tenant of peaceable possession of the premises not being cleared.

We are therefore of the opinion that the court submitted the case to the jury under proper instructions, and that the offer to prove, and requested instructions by appellants, were incorrect.

As to the sufficiency of the evidence to justify the verdict, and that the verdict is the result of passion and prejudice, there is evidence that would justify a larger verdict on the basis of loss of profits alone. The trial court, upon denying the motion for a new trial, remarked:

"The amount of the verdict is rather larger than I should have agreed to had I been on the jury, but not so much so that I feel at liberty to say that the mere amount of it indicates that the jury were swayed by passion and prejudice in arriving at it. There is no suggestion of any other fact that would lead me to suspect that the jury were influenced in any degree by passion and prejudice."

We cannot, therefore, say that the discretion of the trial court was abused in refusing a new trial on the ground of the insufficiency of the evidence to justify the verdict.

Judgment affirmed.

PARKER, C. J., FULLERTON, HOVEY, and MACKINTOSH, JJ., concur.

[No. 17163. Department One. April 21, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Jessie S. Marshall, Plaintiff*, v. THE SUPERIOR COURT FOR SNOHOMISH COUNTY *et al., Respondents.*[1]

CERTIORARI (6)—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Certiorari lies to review an order denying a temporary injunction to restrain the destruction of a building by the fire chief, since the remedy by appeal is inadequate because the building would be destroyed before an appeal would be heard.

APPEAL (380)—REVIEW—ON APPEALS FROM SPECIFIC ORDERS. An appeal from an order denying a temporary injunction brings up for review the court's refusal to make a finding of insolvency.

INJUNCTION (8)—GROUNDS FOR RELIEF—INSOLVENCY OF DEFENDANT. In an action for an injunction to restrain the demolishing of a building by a city building inspector and fire chief, who were married and possessed of no separate property, the plaintiff is entitled to a finding that defendants were insolvent, in view of the grave doubt as to liability of their community estates for the acts about to be committed.

SAME (55, 56)—RIGHT TO TEMPORARY INJUNCTION—IRREPARABLE INJURY. Plaintiff is entitled to a temporary injunction against the threatened destruction of a wooden building in the fire limits, on account of its gradual deterioration through age, where there was no emergency or sudden casualty such as a fire, in view of the insolvency of the officers and the debatable nature of the liability of the city for their acts; and in view of the irreparable nature of the injury and the slight injury or inconvenience from temporarily delaying the destruction until the final disposition of the case.

Certiorari to review an order of the superior court for Snohomish county, Alston, J., entered March 22, 1922, denying a temporary injunction. Reversed.

Lloyd L. Black and *John Sandidge*, for plaintiff.

R. J. Faussett and *J. W. Dootson*, for respondents.

PARKER, C. J.—The relator, Jessie S. Marshall, seeks by this certiorari proceeding a review and reversal of

[1]Reported in 206 Pac. 362.

an order of the superior court for Snohomish county refusing to award her a temporary injunction. Review of the order is so sought because, as it is claimed, there is no other adequate remedy available to her; in that the superior court erroneously refused to make a finding of insolvency of the parties against whom a temporary injunction is sought, thus depriving her of the right of appeal from the order, under subd. 3 of § 1716, Rem. Code (P. C. § 7290), until such finding be made; and in that, even though such finding be made so as to render the order appealable, her threatened property rights will be so completely invaded before final disposition of an appeal in due course as to render the fruits of her litigation of no avail to her. The answer and return made in response to the writ issued by this court is quite full and complete, consisting of all the records and files of the injunction suit in the superior court, including all of the evidence introduced therein up to the time of the making of the order here sought to be reviewed. The facts may be summarized as follows:

On March 8, 1922, relator commenced in the superior court for Snohomish county her suit seeking an injunction restraining the city of Everett, N. E. Butts, its building inspector, and W. A. Taro, chief of its fire department, from proceeding to destroy her certain wooden store building, situated, we assume for present purposes, within the fire limits of the city. A temporary restraining order was on that day issued in the action, *ex parte,* restraining the defendants from proceeding with their threatened destruction of the building, pending relator's application for a temporary injunction to further restrain the destruction of the building until the whole case could be finally disposed of. The application came on regularly for hearing on March 22, 1922, when, upon the record and files, and

the evidence then introduced in the form of numerous affidavits, the court refused to award a temporary injunction pending the final disposition of the case. Thereupon counsel for relator requested the court to find

"(1) The above named defendants, N. E. Butts and W. A. Taro and each of them are married and that neither of them have any property or income which is not community.

"(2) The above named defendants, N. E. Butts and W. A. Taro and each of them are insolvent in the respective capacities in which this action is brought."

This request was by the court refused, the court making no findings whatever upon the subject of insolvency. This disposition of the application for a temporary injunction resulted in the rendering of the temporary restraining order no longer in force. Thereupon this certiorari proceeding was commenced, and relator's claimed rights were held in *statu quo* by an appropriate order of this court in connection with the issuance of the writ, which brings the order refusing the temporary injunction here for review.

The threatened destruction of the building is sought to be justified by the defendants Butts and Taro by virtue of their decision and notice given in pursuance thereof, under the provisions of an ordinance of the city of Everett reading in part as follows:

"No frame or wooden building within the Fire Limits that has become injured by wear and tear, or the action of the elements or fire shall be repaired when such injury is more than 30% of its actual value as decided by the Building Inspector and the Chief of the Fire Department, and upon notice from the Building Inspector such building shall be demolished within thirty days. . . " (Ordinance No. 1,260, § 171.)

On the hearing of the application for a temporary injunction, a number of affidavits were read—all of the

evidence consisting of affidavits—touching the condition of the building, more particularly the question of its decrease in value more than thirty per cent. These affidavits present a fairly debatable question as to whether or not the building has depreciated more than thirty per cent of its actual value. It seems plain that the depreciation of the value of the building, in any event, is not the result of fire or other sudden cause, but is only the result of age and want of keeping it in repair. So the defendants' threat of destruction of the building is not prompted by any urgent necessity in the sense of such necessity being of a sudden creation. Touching the question of the insolvency of the defendants Butts and Taro, the only evidence introduced upon the hearing of the application for a temporary injunction was the following affidavit:

"J. H. Requa, being first duly sworn, upon his oath deposes and says; that I am over the age of twenty-one years and a resident of the city of Everett, Snohomish county, Washington; that the above named defendants, N. E. Butts and W. A. Taro, are each of them a married man and the head of a family; that affiant is informed and believes that neither of said defendants has any separate property or assets of any kind or nature and that the only property held or owned by either of said defendants is community property and as such not subject to execution upon judgment for tort."

It does not seem to be seriously contended that relator does not have the right to have the order refusing a temporary injunction reviewed and corrected, if erroneous, by this certiorari proceeding; if such order is reviewable at all in this court. Indeed, we think there would be no sound ground to rest such contention upon, in view of the fact that the threatened destruction of the building will almost surely be consummated before the final disposition of the case upon the merits in the

superior court; at least nothing but a temporary injunction, apart from the interference of this court, would prevent the defendants from carrying out their threat pending the disposition of the case upon the merits in the superior court. We therefore conclude that relator has a right to invoke this remedy for review of the order refusing a temporary injunction, since appeal would be an inadequate remedy, assuming that she has the right of appeal.

It is argued, however, that relator does not have the right of appeal, or other review, in this court, of the order refusing a temporary injunction, because the trial court did not find that the defendants Butts and Taro were insolvent; counsel for the defendants invoking the provisions of Rem. Code, § 1716, reading in part as follows:

"Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding. . . .

"(3) From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, that no appeal shall be allowed from any order denying a motion for a temporary injunction, or vacating a temporary injunction unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent."

This argument, carried to its logical conclusion, would mean that a superior court's finding of solvency, or its refusal to find insolvency, upon its refusal of a temporary injunction, is entirely beyond review or correction by this court. That a superior court's action in that behalf is not beyond correction in this court, is, we think, settled by our decision in *State ex rel. Davis*

& Co. v. Superior Court, 95 Wash. 258, 163 Pac. 765, where there was drawn in question the refusal of the superior court to grant a temporary injunction and its refusal to make a finding of insolvency of the defendants. As stated in the opinion, relator asked this court

". . . to (1) review the action of the lower court upon the ground that no appeal will lie because of the failure of the lower court to make a finding of insolvency; (2) to review the issue of insolvency; (3) order a supersedeas to issue pending the trial upon the merits."

This court, arriving at the conclusion that relator was entitled to the relief sought, entered an order which had the effect of a temporary injunction of the superior court pending the disposition of the case upon the merits in that court.

Did the superior court erroneously refuse to award a temporary injunction and find Butts and Taro to be insolvent, in so far as their separate property is concerned? It seems probable, though we do not now finally so decide, that whatever damage Butts and Taro might render themselves liable for by a wrongful destruction of the building as threatened by them, would be a charge only upon whatever separate property they might possess, and not a charge upon any community property they might be interested in. The question of their insolvency, we think, becomes one of relator's ability to recover damages as against them which could be satisfied from their property subject to execution upon such a judgment. It at least being a seriously debatable question as to whether or not their community property would be rendered subject to the satisfaction of such damages, we think, for present purposes, we should regard the question of their insolvency as being one of whether or not they are insolvent having reference alone to the separate property

they may own. Now the affidavit above quoted touching the question of the insolvency of Butts and Taro is positive and unqualified as to both of them being married, whatever we may say as to the information and belief of affiant that they possess no separate property. In the text of 5 R. C. L. 844, the learned editors state the presumption of the nature of property arising from marriage, as follows:

"As a general rule, all property in the possession of either spouse during marriage, and all property in their possession at the dissolution of the community, is presumed to be community property until the contrary is shown."

This statement of the law seems to find support in the decisions, particularly in *Fennell v. Drinkhouse,* 131 Cal. 447, 63 Pac. 734, 82 Am. St. 361; and our own decisions in *Stewart v. Bank of Endicott,* 82 Wash. 106, 143 Pac. 458, and *Plath v. Mullins,* 87 Wash. 403, 151 Pac. 811, contain observations which lend support to the view that all property in the control and possession of either spouse is, in the absence of all evidence to the contrary, presumed to be community property. We concede that it is not a very strong presumption and is one that may be easily overcome; but, in the case before us, we have absolutely nothing to overcome the force of the presumption arising from the undisputed marriage of Butts and Taro that they have no separate property, and that, therefore, they are insolvent as to their separate liabilities. It seems to us that the trial judge fell into error in refusing to find that Butts and Taro were both insolvent as to their separate liabilities; and we think we are now warranted in making such finding ourselves and proceeding with the disposition of the question before us as though it had been so found by the trial court.

This brings us to the question of whether or not the

trial court erred in refusing a temporary injunction as prayed for, as that question could have been here upon appeal following such finding. We think, under the circumstances here shown, the court did so err. It seems plain to us that relator—being now in the absolute and undisturbed possession of her building, it not having deteriorated in value by reason of any fire or sudden happening, but merely as the result of age, and the city having no property rights involved herein which are going to be infringed upon or jeopardized in the least by holding relator's claimed property rights in *statu quo* pending the disposition of the injunction suit upon the merits—is entitled to a temporary injunction restraining the defendants from executing their threat of destruction of the building until the final disposition of the case by the superior court.

We have assumed, of course, that the city is not insolvent, and have not lost sight of the fact that it is one of the defendants in the injunction suit. It seems to us that, while that is true, the liability of the city in damages for the possible wrongful destruction of relator's building by Butts and Taro is a seriously debatable question, and that relator should not be put to the hazard of recovering damages from the city, in view of the debatable character of its liability, any more than relator should be put to the hazard of recovering damages chargeable to the community property of Butts and Taro.

We are, on the whole, much influenced in our disposition of this proceeding by the highly probable irreparable injury which would result to relator from the destruction of the building, if wrongfully destroyed; and also by the manifest slight injury or inconvenience which will result to the defendants if they be temporarily enjoined from destroying the building until the final disposition of the case by the superior court.

We conclude that the order of the superior court refusing a temporary injunction as prayed for should be reversed; that the case should now be regarded as having established therein the fact of the insolvency of the defendants Butts and Taro, as to their separate property; and that the ability of relator to recover and collect from the city, Butts and Taro damages for a wrongful destruction of the building is of such uncertain character that she should not be put to that hazard; and that a temporary injunction should issue, restraining the city, Butts and Taro from destroying the building until the final disposition of the case in the superior court. It is so ordered. The superior court is directed to award such a temporary injunction, exacting from relator an injunction bond in the sum of $500, with proper surety or sureties, as a condition to the issuance and keeping in force of such injunction, as was done by the superior court in the issuance of its temporary restraining order.

BRIDGES, FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16866. Department One. April 27, 1922.]

GREAT NORTHERN CONSTRUCTION COMPANY, *Respondent*, v. H. H. GULSTINE, *Appellant*.[1]

CONTRACTS (151)—PERFORMANCE—DELAY—WAIVER. Findings upon the conflicting statements of the parties to a building contract that a delay was waived on account of a strike, are supported where plaintiff's evidence was corroborated by one of defendant's witnesses and by the fact that defendant expressed sympathy with the strike.

SAME (159)—RIGHTS ON PARTIAL PERFORMANCE. Where the parties to a building contract agreed that another contractor should remedy defects in placing the windows, at the expense of the contractor, the amount paid therefor fixes the limits of the contractor's liability for his failure of performance.

COSTS (80)—ON APPEAL—UNNECESSARY MATTER—IMPROPER ABSTRACT. Where the transcript consisted of but 166 pages, costs will not be allowed for an abstract of over 100 pages made up almost exclusively of question and answer, as the same is not a substantial compliance with the rule.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 25, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

S. A. Keenan, for appellant.

John F. Dore, for respondent.

MITCHELL, J.—The Great Northern Construction Company, a corporation, entered into a written contract with H. H. Gulstine by which it agreed to construct a business building for him in the city of Seattle in consideration of the sum of $37,000. The construction company was paid certain amounts on the contract, and this suit was brought to recover the balance. The defendant denied there was anything remaining

[1]Reported in 206 Pac. 356.

unpaid, and affirmatively set up a cross-complaint consisting of counterclaims for a considerable amount alleged to be due him growing out of the transaction. The affirmative matter was denied by a reply. The trial resulted in findings of $1,710.81 unpaid balance due the plaintiff, and $673.75 due the defendant on one of his counterclaims, leaving $1,132.43 still due the plaintiff, in which amount judgment was entered against the defendant. The defendant has appealed.

The contract was entered into on August 15, 1919. It provided the building should be completed, ready for the occupancy of a contract tenant, by January 1, 1920, at the risk of $20 a day as stipulated damages beyond that date. The principal controversy in the case arises over the complaint of the appellant in the sum of $1,200 as damages because the building was not completed and suitable for occupancy until sixty days after the limit fixed in the contract. The respondent admits the delay but answers by averments and proof that, a few days after the contract was made, a strike occurred, that the appellant advised and directed the respondent to delay the building until the strike was settled and that he would waive any claim of demurrage under the terms of the contract. The trial court found in favor of the respondent upon this issue and that it was the cause of the delay of sixty days. The finding is questioned by the appellant. It was denied by him in his testimony, but positively affirmed by the testimony of two of the officers of the respondent corporation, who were corroborated by the testimony of one of appellant's witnesses to whom the appellant expressed decided sympathy against the strikers' cause. In passing on the weight of the evidence on this controverted issue of facts, the trial judge remarked upon his belief in the story told on behalf of the respondent.

The record satisfies us the issue and finding of the trial court on the subject are supported by a preponderance of the evidence.

The trial court found that appellant had paid only $35,193.82 on the contract price. We do not so find. The record clearly shows by respondent's admissions and by appellant's proof that $35,289.19 had been paid on the contract at the time the action was commenced.

The court found that, because of defective construction or improper placing of the windows in the building, the appellant had been compelled to pay out for necessary alterations and repairs the sum of $673.75. It is contended by the appellant, and proof over the objection of the respondent probably shows, that the windows are not yet suitably installed and that it would require a large amount to make them so, for which he is entitled to recover. But the court has found, and we think correctly so, that the $673.75 already allowed must satisfy the appellant in this respect, for the reason that, with the consent of the respondent, the contractor, the appellant arranged with another contractor that he do whatever was thought necessary to put the windows in suitable condition at the expense of the respondent, which was done by the appellant, with the result of the charge already allowed in that behalf.

The contract and specifications required the elevator shaft to be lined with metal and a wall of brick between the boiler and storage room in the basement. These things were omitted and the undisputed proof shows the reasonable cost of them would be $114 and $87.50, respectively. These items should have been allowed the appellant.

We conclude, in restating the account, the respondent is entitled to recover the sum of $1,710.81, from which

deduct $673.75 expended by appellant in repairing the windows, $114 cost of metal lining for the elevator shaft, and $87.50 cost of a brick wall between the boiler and storage room.

The cause is remanded with directions to the trial court to modify the judgment accordingly.

The appellant will not recover costs for the abstract of the record prepared on his behalf. The statement of facts contains only one hundred and sixty-six pages, while the abstract consists of over one hundred pages made up almost exclusively of the evidence by questions and answers just as they appear in the statement of facts. It is not a substantial compliance with the spirit and purpose of the rule requiring an abstract.

PARKER, C. J., FULLERTON, HOVEY, and HOLCOMB, JJ., concur.

[No. 16745. Department One. April 27, 1922.]

In the Matter of the Assessment Roll for the Filling of WASHINGTON AVENUE, BREMERTON.[1]

APPEAL (418)—REVIEW—FINDINGS. Findings on conflicting evidence will be sustained when supported by the preponderance of the evidence.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered July 7, 1921, upon findings in favor of the plaintiffs, in an action to secure the reduction of an assessment, tried to the court. Affirmed.

Bryan & Garland, for appellant.

Trefethen & Findley and *Peterson & Macbride,* for respondents.

[1]Reported in 206 Pac. 1119.

MITCHELL, J.—This action involves the validity of assessments against property in a local improvement district in the city of Bremerton. An appeal was taken to the superior court by Mrs. Anna Schmidt and C. M. Rivers, owners of the property affected by the assessment, from the assessment made by the city council. The superior court found the assessments complained of to have been arbitrarily and excessively made and granted a reduction. From a judgment to that effect, the city has taken the present appeal.

On behalf of the city, a number of assignments of error have been presented and discussed in its brief. Upon the call of the case for argument in this court, the present city attorney, not the one who tried the case and prepared the city's brief upon appeal, properly admitted that the only question in the case is the distribution of the assessments for the costs of the improvement. We say the admission was proper, because an examination of the record satisfies us that none of the assignments thus practically waived has any merit.

Upon the one question left in the case, the trial court found as follows:

"(4) That thereafter, towit: on December 8, 1919, an assessment roll prepared by the city engineer of Bremerton, was submitted to the city council of Bremerton, which after objections of the appellants herein had been overruled, was approved by ordinance No. 675. That the assessment of appellants' property under said roll is not in accordance with the benefits derived from the improvement, but is arbitrary and assessed upon a fundamentally wrong basis, in this, towit: that appellants are assessed at the rate of $456.88 per lot on lots 15, 16, 17 and 18, block 4, of the Original Town of Bremerton, and $167.53 on fractional lot 19, adjoining said property described, which assessments are in excess of any and all benefits derived by said property from said improvement; and further, in that

lots of the same size directly across the street from the property of appellants, were assessed only $9.46 per lot, although said lots are equally benefited by the said improvement; and further, in that lots of the same size in the blocks adjacent to the block wherein the lots of appellants lie, also facing on Washington Avenue, are assessed $9.46 per lot, or less, although the same are equally benefited with the lots of the appellants.

"(5) That the lots of the appellants were benefited by said improvement to the amounts hereinafter set forth, and no more:

Lot 15, block 4, Original Town of Bremerton, $125.00
Lot 16, block 4, Original Town of Bremerton, $125.00.
Lot 17, block 4, Original Town of Bremerton, $125.00.
Lot 18, block 4, Original Town of Bremerton, $125.00.
Fractional lot 19, Blk 4, Original Town of Bremerton, $25.00."

While there was some conflict in the evidence, it, without question, strongly supports and preponderates in favor of the findings, especially in view of the admitted theory or basis of the judgment and opinions of the city's witnesses, which we think were erroneous.

Affirmed.

PARKER, C. J., FULLERTON, HOLCOMB, and HOVEY, JJ., concur.

[No. 16848. Department One. April 27, 1922.]

REVELARE INTERNATIONAL SECRET SERVICE, *Appellant*, v. WHATCOM COUNTY *et al.*, *Respondents*.[1]

COUNTIES (100)—ACTIONS—PLEADING—CONTRACTS. In an action against a county upon a written contract made by the sheriff and prosecuting attorney for services in the enforcement of the liquor law, under Rem. Comp. Stat., § 4940, setting aside for that purpose fifty per cent of all fines collected for liquor violations, the complaint states a cause of action against the county where it alleges that the contract was made with the consent and approval and by the authority of the county commissioners.

MANDAMUS (52)—ISSUE OF WARRANTS FOR PAYMENT. Mandamus lies to compel the issuance of a county warrant upon a claim under a written contract, which was arbitrarily rejected by the county commissioners.

Appeal from a judgment of the superior court for Whatcom county, Brawley, J., entered August 8, 1921, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Walter B. Whitcomb, for appellant.

Sather & Livesey, for respondents.

MITCHELL, J.—The question in this case concerns the sufficiency of a complaint to recover for services and expenses in the performance of a contract made with certain officers of Whatcom county under the provisions of ch. 30, Laws of 1919, p. 57.

The act provides for the disposition of fines and forfeitures for violation of the provisions of initiative measure No. 3, enacted by popular vote in November, 1914. It states, among other things, as follows:

"*Provided, however,* that fifty per cent (50%) of all fines collected for the violation of any of the provisions of Initiative Measure No. 3 enacted by the people

[1]Reported in 206 Pac. 564.

November 3, 1914, shall be turned in to the county treasurer of the county wherein such violation occurred, to be kept as a special fund by said county treasurer and to be used for the purpose of obtaining evidence in other cases pertaining to the violation of the provisions of said Initiative Measure No. 3 enacted by the people November 3, 1914, said fund to be drawn upon by vouchers by the sheriff of the county wherein the said violation occurred and approved by the prosecuting attorney and a majority of the board of county commissioners of said county." (Laws of 1919, ch. 30, § 1, p. 57; Rem. Comp. Stat., § 4940.

The complaint alleges, in substance, that the sheriff and prosecuting attorney of the county, with the knowledge, approval and consent and by the authority of the board of county commissioners of Whatcom county, and in accordance with the universal practice of the county commissioners, sheriff and prosecuting attorney with relation to the creation of obligations against and the expenditure of funds of the liquor investigation fund, on behalf of themselves, sheriff and prosecuting attorney, and on behalf of the county commissioners and the county of Whatcom, entered into a written contract with the plaintiff to render services in obtaining evidence pertaining to violations of the provisions of initiative measure No. 3. The complaint sets out in full the written contract signed by the sheriff and prosecuting attorney. The complaint further alleges the rendition of services and the incurring of expenses pursuant to the contract, the drawing of vouchers by the sheriff upon the liquor investigation fund for the amounts due; that they were duly approved by the sheriff and prosecuting attorney, duly filed with the county auditor and presented to the board of county commissioners; that the vouchers were duly subscribed and sworn to by the plaintiff and that they

were disallowed by the board of county commissioners; that, at the time the vouchers were drawn and at all times since, there were and have been ample funds in the liquor investigation fund to pay all sums due the plaintiff, and that the board of county commissioners arbitrarily refused, and still refuse, to approve the vouchers and order warrants drawn upon the special fund in payment of the claims, and that the auditor of the county refuses to issue warrants drawn on the special fund in payment of the demands of the plaintiff in the sum of $1,320, which is the reasonable and agreed value of services rendered and expenses incurred, no part of which has been paid. The prayer of the complaint is for judgment in the amount claimed, with interest, against the liquor investigation fund of the county, and that the board of county commissioners audit and approve the same and order warrants to issue, and that the auditor issue warrants accordingly. A demurrer to the complaint was sustained. The plaintiff refused to amend, and from a judgment of dismissal has prosecuted this appeal.

The arguments on behalf of the respondents in support of the judgment are: That, as it appears upon the face of the complaint, the contract was one between the appellant on the one side and the sheriff and prosecuting attorney on the other side, and not a contract with Whatcom county represented by the respondents; that the county commissioners are the business agents of the county, which cannot be bound directly or indirectly by a contract not approved by a majority of the board; and that the relief demanded in the complaint is governed by a law which requires that any voucher drawn on the fund must be approved by the prosecuting attorney and a majority of the board of county commissioners, which requires the exercise of

discretion that will not be controlled by the courts by writ of mandate. Neither contention is sound as applied to this case. Considering the two first points together, there is nothing in the law requiring contracts for such services and expenses to be in writing. The complaint shows that, while there was a writing signed on the one side by only the sheriff and prosecuting attorney, nevertheless it is specifically alleged in the complaint that the agreement was made with the knowledge, approval and consent and by the authority of the board of county commissioners, and according to the universal manner and practice of making contracts for services and expenses to be paid for out of the funds in the liquor investigation fund. The general demurrer admits these allegations, so that, as it appears upon the face of the complaint, the contract was one between the appellant, on the one part, and the sheriff, county attorney and county commissioners on the other side; while as to the contract not being binding so far as the county commissioners are concerned because not approved by them, the plain language of the complaint is that they exercised their authority by approving it at the time it was made and prior to the rendition of the services and incurring the expense for which recovery is sought.

Concerning the third point, mandamus lies to compel the ordering of and the issuance of a warrant by the county auditor to pay a claim arbitrarily rejected by the county commissioners. " 'In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs.' " *State ex rel. Clapp v. Urquhart*, 108 Wash. 299, 183 Pac. 121; *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50; *State ex rel. Taro*

v. Everett, 101 Wash. 561, 172 Pac. 752, L. R. A. 1918E 411.

Reversed, with directions to overrule the demurrer.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16806. Department Two. April 27, 1922.]

J. W. MASTERSON, *Appellant,* v. CHARLES HAISLETT *et al., Respondents.*[1]

PRINCIPAL AND AGENT (35)—AUTHORITY—COLLECTION OF DEBTS. Findings that a note and mortgage were paid in full to the holder's authorized agent are sustained, where it appears that for four years the holder had allowed the agent who negotiated the loan to collect interest and payments, without notice to the maker that he was not authorized to receive it, notwithstanding the agent appropriated and failed to account for the last payment after giving a receipt in full.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered June 27, 1921, in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

Welsh & Welsh and *E. S. Snelling,* for appellant.

Sherwood & Mansfield, for respondents.

HOLCOMB, J.—This action was commenced to foreclose a mortgage for the unpaid balance of $300 of principal, together with interest at the rate of ten per cent per annum from February 9, 1919, until paid, and for attorney's fees and costs.

The original debt, and the mortgage securing the same, was $400. The loan was negotiated by one P. W. Rhodes, a short time prior to February 9, 1914. The amount of the loan was delivered by appellant to Rhodes, who delivered it to respondents upon the ex-

[1]Reported in 206 Pac. 359.

ecution of the note and mortgage. Thereafter Rhodes caused the mortgage to be recorded in the records of real estate mortgages in the proper office in Pacific county. Immediately after the recording of the mortgage, the note and mortgage were delivered by Rhodes to appellant, and ever since that time appellant has been in possession of them. Interest was payable annually, and respondents paid interest to Rhodes on the note as follows: April 11, 1915, $40; May 9, 1916, $40; February 21, 1917, $40; February 9, 1918, $40, which interest payments were thereafter paid by Rhodes to appellant. On February 15, 1919, respondents paid to Rhodes $340 for which Rhodes gave them a receipt signed by himself individually, and not as agent. Of this sum Rhodes paid to appellant $140, forty dollars being for interest, and one hundred dollars for principal. Appellant never received any other or further sum of money on the note and mortgage. On February 15, 1920, respondents paid to Rhodes $110 and received from Rhodes his receipt reciting that it was in full payment of the mortgage dated February 9, 1914, on the premises described in the mortgage.

Respondents answered plaintiff's complaint, and admitted the receipt by them of the $400, and the execution by them of the note and mortgage as alleged in the complaint. They further alleged that Rhodes was the agent of appellant, and that they paid the note and mortgage in full to Rhodes, and prayed that plaintiff be compelled to satisfy the mortgage of record, and that the court award them a penalty in the sum of $25 because of the refusal of the appellant to satisfy the mortgage. Appellant replied, denying the material allegations of the affirmative answer of respondents, and denied that Rhodes was his agent, or that he was

ever authorized to receive the money on the note and mortgage for him.

The court entered judgment in favor of respondents, reciting that the mortgage indebtedness had been paid, that defendants were entitled to a release of the mortgage of record, and in addition thereto a penalty in the sum of $25 for failure to release the mortgage of record, and ordered the county auditor to cancel the mortgage of record.

Appellant assigns as error the recital in the decree that respondents had paid to appellant, through his authorized agent, the full amount of the indebtedness, and that the mortgage indebtedness was paid and respondents are entitled to a release and discharge of the mortgage. Various assignments are also made as to the admission in evidence by the trial court of certain papers purporting to be statements rendered by Rhodes to appellant.

The objections to the admission of the alleged statements by Rhodes to appellant we consider unimportant. The question to be determined is whether Rhodes was the agent of appellant or not. The evidence by appellant himself shows that Rhodes was handling money generally for appellant to be loaned upon real estate security, and that Rhodes systematically collected the moneys coming due upon the loans and in general settled with appellant. Appellant testified that Rhodes adopted a system of rendering monthly statements to appellant by mail or by hand. Appellant and respondents had never met until the day of the trial. Appellant gave respondents no notice that Rhodes was not authorized to collect moneys falling due upon the loan, for appellant, and to pay such moneys directly to appellant. For four years interest payments were made through Rhodes and paid by him to appellant. A part of the principal payment

which was made by respondents to Rhodes in 1919 was paid over to appellant. The remainder was appropriated by Rhodes. About two years before the maturity of this mortgage debt, appellant became dissatisfied with Rhodes, but permitted him to continue to make collections on loans and report. He did not discharge Rhodes. Under such a state of affairs the fault, if any, was with appellant, who put it in the power of Rhodes to defraud respondents, and not the fault of respondents. Rhodes was the agent of appellant, and not of respondents. At least he apparently possessed the status and authority of an agent to do the things he did. We recently decided a similar case in *Kraus v. Dowell, ante* p. 90, 204 Pac. 795, there holding that, under such circumstances, the loan broker was the agent of the mortgagee.

We consider the judgment correct and it is affirmed.

PARKER, C. J., HOVEY, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16889. Department Two. April 27, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. H. Q. SIMPSON, *Appellant*.[1]

CRIMINAL LAW (84)—EVIDENCE—FACTS IN ISSUE—RELEVANCY. In a prosecution for robbery, upon a question as to whether accused had time to drive his accomplices to the scene of the crime by a certain route and wait for them a short distance away, it is proper to admit evidence of the time taken to drive another automobile over the same route.

WITNESSES (122)—IMPEACHMENT—INCONSISTENT STATEMENTS. An accomplice testifying that accused drove the perpetrators of a robbery over a certain route, may be impeached by his statement, made in the absence of the accused, that he drove over another route, as testified to by another witness.

[1]Reported in 206 Pac. 561.

Criminal Law (145)—Evidence—Maps. In a prosecution for robbery, it is not error to exclude a map or sketch, where it was immaterial and other testimony identified the only thing upon it.

Same (296)—Trial—Instructions as to Accomplices. An instruction as to the responsibility of an accomplice who drove his associates to and from the scene of a robbery is favorable to the accused where it was to the effect that association with the others in the robbery would make him an accomplice, but that he would not be guilty unless he aided, counselled or assisted in its commission.

Same (316)—Trial—Instructions. It is not error to refuse to give instructions in the language requested, if covered by instructions given.

Same (441)—Appeal—Review—Questions of Fact. A conviction supported by evidence will not be set aside for insufficient evidence, especially where it was largely a question of the credibility of witnesses and the jury went over, and viewed, the scene of the crime.

Same (450, 451)—Appeal—Harmless Error—Examination of Witness. Prejudicial error cannot be predicated upon offering the wife of the accused as a witness, and stating that it had something to do with a revolver and not to any communication with accused, where the jury were excused during argument thereon, and the evidence was excluded.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 14, 1921, upon a trial and conviction of robbery. Affirmed.

S. A. Bostwick, for appellant.

Thos. A. Stiger and *Q. A. Kaune,* for respondent.

Holcomb, J.—Appellant, with others, was charged by information with the crime of robbery. The charging part of the information applying to appellant was:

"The said H. Q. Simpson . . . then and there being at the said felonious taking, stealing and carrying away of said money, . . . did then and there, and prior thereto did, wilfully, unlawfully and feloniously advise, encourage, counsel, aid and abet the said Oscar Lowe and Guy Troutman to commit said robbery."

He was tried, convicted and sentenced. Timely motion was made for a new trial and overruled.

A brief statement of the facts as shown at the trial is as follows: Shortly after noon, February 16, 1921, Troutman and Lowe entered the Rucker bank at Lake Stevens, a small village in Snohomish county, and by threats, force and violence to the cashier and one Vanderpool, a bank examiner, took, stole and carried away $1,440.55 of the bank's money. Lowe and appellant, Simpson, were arrested about two hours later as they and Troutman came out of the woods upon a public highway a few miles distant from the bank. When they were first arrested and for several days thereafter, they both claimed they were total strangers and that they had only casually met a few minutes before their arrest. Troutman was arrested several days later. Until the arrest of Troutman, Simpson insisted that he was not in Lake Stevens at the time of the robbery, and knew nothing about any bank robbery. It was shown that Simpson, Lowe and Troutman all lived in Tenino, Washington, were acquainted with each other, and that they, with one Williams, had left Tenino in a Ford car on the Monday morning prior to the robbery of the bank and drove to Everett, where they stayed all night. The next day they drove to Bellingham and stayed all night there. On the following day they left Bellingham, driving to Lake Stevens, which place they reached about noon, when Troutman and Lowe entered and robbed the bank. After the bank was robbed, all four of the men left the scene of the robbery in the Ford car, appellant Simpson driving the car. He drove the car at a furious rate of speed, over a devious route, and then had tire trouble, and finally had to abandon the car and take to the woods. Williams deserted the other

three a short distance from the place where the car had been stationed at the time of the robbery. Lowe, Troutman and appellant remained together until appellant and Lowe were arrested. Troutman was in sight at the time of the arrest of Lowe and appellant, but eluded the sheriff, and was not apprehended for four or five days, at which time he made a full confession of the whole matter. He testified as a witness for the state at the trial of appellant. Lowe and Troutman both pleaded guilty and were sentenced to the penitentiary. Lowe testified that Simpson knew nothing of the plan to rob the bank, while Troutman testified that they all four had conspired to rob the bank, and that the last minute plan was that Simpson's part was to stay with the car a short distance outside of Lake Stevens while Lowe and Troutman entered the bank and Williams stood guard in the street.

Errors are claimed by appellant as to the admission and rejection of evidence by the trial court, specifying the admission of the testimony of a witness named Denny, who testified that he drove an automobile, not quite 25 miles an hour, and that it took him three minutes to drive from the point where the monorail goes over the pavement around the dirt road north and back into the town of Lake Stevens; and in excluding the introduction of appellant's exhibit 2, being a map of the vicinity showing the location of the road, introduced by the state in the former trial and identified by Troutman; and in permitting the witness West to testify that Lowe, in the absence of appellant, acknowledged that appellant drove around the road and let Williams off at Lake Stevens.

The evidence of Denny was competent to show that it was possible to take the route testified to by Troutman and leave the men who robbed the bank and the one who stood guard in the street and return to the

place on the pavement at the monorail. The testimony of West was competent to show a contradictory statement and tend to discredit the testimony of Lowe, who testified in favor of appellant that they did not drive around the road and back into town and let Williams off, as testified to by Troutman. There was no error in rejecting the map or pencil sketch offered in evidence, since it did not appear to be material nor important, and the witness who testified as to the map identified only one thing upon it, and that was the location of the bank.

It is further claimed that the court erred in refusing to instruct as requested in two requests of appellant. The court did, however, instruct the jury as follows:

"You are instructed that the witnesses, Guy Troutman and Oscar Lowe, who have testified in this case, are accomplices, and an accomplice is one who is associated with others in the commission of crime, all being principals. Troutman has testified that he and Lowe were associated with the defendant, Simpson, in robbing the bank mentioned in the information, and that, in law, would make them accomplices."

The jury was further instructed:

"Even though you should find, beyond a reasonable doubt, that the defendant, Simpson, after the robbery was committed, assisted those who committed it in their escape, you cannot find the defendant guilty unless you should believe beyond a reasonable doubt that prior to or during the robbery, he aided, counseled or in some manner abetted or assisted in its commission."

These instructions were as favorable to appellant as could be desired, and appellant was not entitled to instructions given in the exact language requested by him. It is sufficient to give correct instructions upon any issue involved in a case in the language of the court.

It is contended that the court erred in not granting a new trial. There was ample testimony, if believed by the jury, to convict appellant. True, there was a conflict in the testimony and the jury was compelled to believe one side or the other of the conflicting testimony. While appellant contends that the testimony of the accomplice Troutman is unworthy of belief, the jury went over, and viewed, the scene of the robbery and the vicinity involved, and for that reason, as well as upon general well accepted reasons, were much better able to judge of the credibility of the two accomplices as witnesses than we are.

The last contention of appellant is that he was deprived of a fair trial by the attempted introduction of his wife as a witness, and by the prosecution stating what was intended to be proven by her. This is not assigned as error in the brief of appellant. However, there was nothing prejudicial occurring in respect to the matter. A woman named Viola Simpson was called as a witness by the prosecutor and sworn. Thereupon counsel for appellant stated that the witness was the wife of appellant, and objected to her testifying. The prosecutor did not examine, but said that it was intended to prove no kind of communications between her and appellant, but that it was only intended to prove something regarding a nickel-plated pistol. Thereupon the jury was excused, and while absent the witness was interrogated and the trial judge concluded that she could not testify over the objection of appellant, and she was excused. The jury was returned into court and the trial proceeded. From her evidence given to the court in the absence of the jury it is at least a question as to whether the woman was legally married to appellant, so that he was entitled to claim the privilege of the statute. However, it is manifest that there was nothing whatever prejudicial to appel-

lant occurring in the foregoing matter which could have prejudiced the jury.

We can find no error in the record, and the judgment must be affirmed.

Affirmed.

PARKER, C. J., FULLERTON, HOVEY, and MACKINTOSH, JJ., concur.

[No. 16772. Department One. April 27, 1922.]

NORMAN ARNESON, *Appellant*, v. WILLIAM COPEMAN, *as Executor etc., Respondent.*[1]

FRAUD (22)—EVIDENCE—SUFFICIENCY. Obscurity in the language of a written contract is not alone sufficient to establish fraud, in the absence of any evidence of overreaching.

EXECUTORS AND ADMINISTRATORS (154) — ACTIONS — JUDGMENT—LIEN. In an action against an executor to recover money collected by the decedent under an agreement on the sale of mining claims, contemplating also an incorporation of a company and a further payment in stock, the plaintiff is not entitled to have the judgment recovered declared a specific lien on the money of the estate, in the absence of proof of fraud, and cannot ask more than the establishment of a lien against decedent's interest in the mining claims, no company having been formed or stock delivered.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 15, 1921, in favor of the plaintiff, in an action to enforce claims against the estate of a decedent, tried to the court. Affirmed.

Charles Grant, for appellant.

Cordiner & Cordiner, for respondent.

FULLERTON, J.—In May, 1918, the appellant, Arneson, and one John Copeman and one J. P. Nelson,

[1]Reported in 206 Pac. 355.

located certain mining claims in the states of Idaho and Montana, the parties owning the claims in equal moieties. In June of the same year the appellant gave John Copeman a power of attorney authorizing Copeman to sell his interests in the claims. In August, 1919, Copeman sold the appellant's interests to one Haguewood for one thousand dollars, receiving one hundred dollars in cash and taking four separate promissory notes, payable on different dates, to evidence the deferred payments. Subsequently the appellant indorsed the notes, making them payable to Copeman. At the time of this indorsement, namely, on September 1, 1919, the appellant and Copeman entered into a written agreement in which it is recited that the appellant "has this day received the sum of five hundred dollars to be paid according to the terms of four promissory notes for quit claim deed" to the mining claims, and that it is the intention of the parties to form a corporation and turn over the mining claims for stock therein, and that when said corporation is organized the appellant "shall receive five thousand shares of the capital stock of said corporation in addition to the money heretofore paid him, as hereinabove stated." Subsequent to this agreement, three of the notes indorsed by the appellant to Copeman were paid. This money Copeman appropriated to his own use. The contemplated corporation was never organized.

On February 24, 1920, John Copeman died, leaving a will in which he named his brother, William Copeman, as executor of his estate. The will was probated in the superior court of Spokane county, and subsequent thereto the appellant brought the present action against the estate, seeking a recovery of the sums collected by Copeman on the purchase price of the mining claims and the recovery of the unpaid note; seeking further to have the money judgment which should be

awarded him declared a preferred lien upon the money in the possession of Copeman at the time of his death. The cause was tried before the court sitting without a jury, and resulted in a judgment in favor of the appellant for the sum of five hundred dollars. The court refused to declare the judgment a specific lien on the money, but in lieu thereof adjudged it to be a lien on the estate's interest in the mining claims. The appeal is from the refusal of the court to enter a judgment according to the prayer of the complaint.

The appellant contends that he was induced by the fraud of John Copeman to indorse to him the notes given as the purchase price of the mining claims, and that, in consequence, he is entitled to recover the full amount of the purchase price, rather than the one-half thereof which the court awarded. But we agree with the trial court that there was not sufficient evidence to substantiate the charge of fraud. The charge is based principally upon the language of the mutual written agreement entered into at the time the notes were indorsed. But while this language is obscure and evidently does not very accurately disclose the actual agreement between the parties, this condition alone is not sufficient to support a charge of fraud. There is nothing to show that the appellant did not as fully understand the nature of the writing as did Copeman, and nothing, of course, to indicate that the latter induced the appellant to execute it by any form of overreaching.

Owing to the nature of the case, the evidence was very meager. Copeman having died, the appellant was precluded by the statute from testifying orally to any transaction had with him. He was thus able to show only the surrounding circumstances, the fact that he indorsed the notes to Copeman, and the mutual execution of the writing entered into at the time the notes

were so indorsed. This evidence, in our opinion, does not warrant a more favorable judgment in favor of the appellant than the court awarded him.

The other contention is that the court erred in refusing to make the judgment awarded a lien upon the specific money of which Copeman died possessed. This contention is founded on the claim that the money was money received from the collection of the indorsed notes. But this circumstance furnished no ground for the specific relief asked. What would have been the appellant's rights in this regard had it been shown that the notes were obtained from him through fraud, we need not consider. In the absence of such proofs, money collected on the notes differed in no respect from money received by Copeman from any other source.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 17021. Department One. April 27, 1922.]

G. T. KRAUSE, *Appellant*, v. THE INDUSTRIAL INSURANCE COMMISSION, *Respondent*.[1]

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION—ORDERS OF COMMISSION—REVIEW. The courts cannot review an order of the industrial insurance commission on the facts of the classification, determining the amount of the award, where it was not capricious or arbitrary or based upon a misconstruction of the statutes.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered June 21, 1921, affirming an order of the industrial insurance commission, after a hearing before the court. Affirmed.

[1]Reported in 206 Pac. 358.

P. L. Pendleton, for appellant.

The Attorney General and *John H. Dunbar, Assistant,* for respondent.

PER CURIAM.—On August 8, 1918, the appellant, Krause, while employed in an extra-hazardous occupation, was injured. He made application to the industrial insurance commission for compensation, and that body, after due examination, classified his injury as a permanent partial disability and made an award accordingly. In January, 1920, the appellant applied to the commission for a new classification, claiming that aggravation of his injuries had taken place so as to totally disable him, and that his injury should be classified as one of total disability. On receiving the application the commission caused the appellant to be examined by its chief medical advisor, who reported against the claim of the appellant, whereupon the commission refused a change of classification. The appellant thereupon instituted the present proceeding in the superior court of Pierce county to review the order of the commission. In that court a full examination into the matter was had, the final result being an affirmance of the order of the commission.

The cause presents some distressing features. The appellant was undoubtedly, at the time of trial, in a serious condition. There was, however, a sharp conflict of medical opinion whether his condition arose from an aggravation of his original injuries or from causes independent thereof—a conflict sufficiently sharp to compel the holding that the action of the commission was not capricious or arbitrary.

Although it has been repeatedly pressed upon us so to do, we do not feel that we should depart from our holding to the effect that an order of the commission

is not to be reviewed unless it clearly appears that the order is capricious or arbitrary, or is based upon a misconstruction of the governing statutes. It seems to us that so to do would be to take the administration of the insurance code from the commission in whom the legislature has vested it and vest it in the courts. Whether chaotic results would ensue from such a holding is, of course, only problematical, but we think it can hardly be gainsaid that the holding would hinder and delay that speedy adjustment of claims which the legislature has been so careful to provide, both for the benefit of the claimant and for the protection of the contributors to the fund out of which the claims are paid.

Nor do we feel that we have misinterpreted the legislative intent. Many sessions of the legislature have passed since we first announced the rule, and, while that body has repeatedly amended the code in other particulars, it has not changed the wording of the section relative to reviews; and this in face of the fact that we early pointed out that the wording of the section was not altogether clear, and was possibly capable of a different interpretation from that which we gave to it. Seemingly, if we had mistaken the legislative meaning, the legislature itself would have long since corrected us.

Affirmed.

[No. 16811. Department One. April 27, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. PAT CANTWELL, *Appellant*.[1]

CRIMINAL LAW (137) — EVIDENCE — HEARSAY — DECLARATIONS OF THIRD PERSONS. In a prosecution for criminal syndicalism, on an issue as to the unlawful purposes of membership in the I. W. W., testimony as to what supposed members of the organization stated and told the witnesses were the purposes of the organization is inadmissible as hearsay.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered March 12, 1921, upon a trial and conviction of criminal syndicalism. Reversed.

Ralph S. Pierce, for appellant.

Thos. A. Stiger and *Q. A. Kaune,* for respondent.

BRIDGES, J.—The appellant was convicted of the statutory crime of syndicalism, and has appealed to this court. He was charged, among other things, with being connected with the Industrial Workers of the World, an organization or group of persons formed to advocate and teach crime, sedition, violence, intimidation and injury as a means and way of effecting an industrial, economic, social and political change. After proving that the defendant was a member of the organization, it was then necessary that the state prove that the purposes of this organization were those prohibited by the statute. In order to make this proof, it brought on several witnesses who testified that they knew what the purposes and objects of the organization were; that they had obtained such information through private conversations, concerning the purposes of the organization, with a great many men, who said they

[1]Reported in 206 Pac. 362.

were members, or whose cards of membership had been displayed, and whom the witnesses believed to be members, and who told them what such objects and purposes were; also through speeches made by persons who were authorized by the organization to speak for it, and who were accredited for that purpose, and which speeches the witnesses had personally heard, such speeches usually being made in I. W. W. halls or places of assemblage. These witnesses did not pretend to show what portions of their information they had obtained through the speeches and what portion from the private conversations had with members and purported members of the organization.

In the case of *State v. Gibson,* 115 Wash. 512, 197 Pac. 611, we held that testimony of witnesses as to statements made to them by persons whom they had reason to believe were I. W. W.'s, as to the objects and purposes of the organization, were inadmissible. In the more recent case of *State v. Pettilla,* 116 Wash. 589, 200 Pac. 332, we said:

"The rule is: That the ban of hearsay testimony must be placed upon the use of witnesses whose testimony is a recital of what they have been told by persons who they have reason to believe are I. W. W.'s, either by the discovery upon them of membership cards, or by their declarations of membership, or other facts which lead the witnesses to the belief of the membership in the organization of the persons with whom they have held the conversations touching the purposes and objects, the principles and teachings of the organization; . . . . ."

The witnesses here, as in the *Gibson* case, *supra,* were testifying as to what supposed members of the organization who were not shown to have authority to speak had told them in private conversations concerning the objects and purposes of the organization. Un-

der the doctrine of the *Gibson* and *Pettilla* cases, *supra,* it was error to receive this class of testimony.

We do not find it necessary to review any of the other alleged errors. We find them either without merit or such as are not likely to occur on a new trial, or such as have already been covered by our previous decisions. For the error stated, the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 17173. Department One. April 29, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Malcolm Douglas, Prosecuting Attorney, Plaintiff,* v. I. STRATINER *et al., Respondents.*[1]

CERTIORARI (14)—CRIMINAL LAW (382)—RIGHT OF STATE TO REVIEW—INTERLOCUTORY ORDERS. Certiorari does not lie to review an order suppressing evidence obtained through a wrongful search, as the same is an interlocutory ruling amounting to nothing more than a rejection of evidence needed by the state.

CERTIORARI (14)—CRIMINAL LAW (382)—RIGHT OF STATE TO REVIEW. Under Rem. Code, § 1716, limiting the right of the state to appeal in criminal cases to orders setting aside the information or arresting judgment for insufficiency of the facts or errors of law not affecting an acquittal on the merits, it was the intent to deprive the state of the right to any other review, whether by appeal or certiorari; hence certiorari will not lie to review an interlocutory order suppressing evidence in a criminal case.

Application filed in the supreme court March 27, 1922, for a writ of certiorari to review an order of the superior court for King county, Brinker, J., entered March 8, 1922, suppressing certain testimony in a criminal prosecution. Denied.

[1]Reported in 206 Pac. 353.

Malcolm Douglas, Bert C. Ross, and *Chester A. Batchelor,* for relator.

John F. Dore and *J. Kalina,* for respondent.

BRIDGES, J.—Certain iron piping was stolen from the Crane Company, a corporation. The prosecuting attorney of King county and special deputy sheriffs visited the place of business of I. Stratiner and J. Salzman, junk dealers in Seattle, in an effort to find the stolen property. They found the property in possession of these parties, and later took it away. They also took away with them certain papers found in the junk company's office, which papers, it is contended, tended to implicate the junk dealers. The prosecuting attorney claimed that he made the search for the piping and papers and took them away with him with the consent of the junk dealers. Thereafter an information was sworn out against these men, charging them with the crime of grand larceny (concealing stolen property). When the case was finally called for trial, and before the jury was made up, the defendants presented a motion to the court to the effect that "upon the trial of this cause the plaintiff be prevented from using any of the articles named in the information herein (pipe and papers) as evidence." This motion was supported and opposed by affidavits of the respective parties, showing the manner in which the pipe and papers were acquired by the prosecuting attorney's office. After argument, the court orally announced that "this being a criminal case, the law must be strictly construed against the state and in favor of the defendants, and I think, under these conditions, and from the facts and authorities cited, I will have to grant the motion of the defendants." The court continued the trial of the case for thirty days in order that the state might bring the matter to this court for decision. Thereafter the pros-

ecuting attorney presented to this court his petition for a writ of certiorari, wherein he set out in detail the facts above recited, and others. We issued a writ requiring the court to certify to us all the proceedings in the case. We are here asked to review the facts and determine whether the prosecuting attorney came into possession of the iron pipe and papers in such manner as that they may be used as evidence in the trial of the case. It is contended that we cannot decide the merits of this case because the state cannot secure a review, by means of a writ of certiorari, of the question involved.

Section 1002, Rem. Code (P. C. § 7418), is as follows:

"A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law."

Subdivision 7 of § 1716, Rem. Code (P. C. § 7290), with reference to appeals, provides:

". . . . . But an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or is some other material error in law not affecting the acquittal of a prisoner on the merits."

The state contends that the statute does not give it any right of appeal in a case of this character, and that it could not appeal from a ruling of the court during the trial of the case rejecting the evidence here involved; that it will be unable to obtain any conviction

unless it can use this evidence, and that since the state can have no appeal, it comes within the certiorari statute, which permits this court to review on certiorari questions which cannot be reviewed on appeal.

While the ruling of the court was on a motion to suppress testimony, it amounts to nothing more than a ruling that certain testimony, if offered by the state, will be rejected. It amounts to a ruling of the court during the progress of the trial. We are asked to review an interlocutory order. Manifestly, under the broadest interpretation of the appeal or certiorari statutes, no review could be had of such a ruling. If, by this proceeding, we review an order of the court concerning the suppression of testimony, then we see no reason why, by means of similar procedure, we would not be required to review any and all non-appealable adverse orders that the court might make in a criminal case; such, for instance, as an order sustaining a demurrer to the information or indictment, or any ruling concerning the admissibility of testimony. It was never intended, in any kind of a case, that such things should be reviewed either by appeal or by writ of certiorari. We have held that certiorari will not lie to review an order striking an amended complaint. *State ex rel. Mohr v. Superior Court,* 54 Wash. 225, 103 Pac. 17. We will not review by certiorari any interlocutory order. *State ex rel. Langley v. Superior Court,* 73 Wash. 110, 131 Pac. 482; *State ex rel. Ladd & Tilton Bank v. Superior Court,* 117 Wash. 544, 201 Pac. 782.

But there is a still more fundamental reason for refusing to consider the merits of this matter: the appeal statute makes it perfectly plain, it seems to us, that the legislature intended to deprive the state of the power to have reviewed in this court any ruling or error whatsoever of the trial court in a criminal case,

except error in setting aside the indictment or information, or in arresting judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or some other material error in law not affecting an acquittal on the merits. Section 1716, Rem. Code. The right of review by appeal or certiorari is purely statutory. When the legislature gave the state the right of appeal in criminal cases only from certain designated orders or judgments, it effectually denied appeal from any other orders and judgments. To hold that we can review by certiorari what we are prohibited from reviewing by appeal would be merely to circumvent the legislative intent. In some instances we may, by certiorari, review questions which the legislature has failed to authorize us to review by appeal; but we should not have any power to review by certiorari that which the legislature has said shall not be reviewed by appeal. In short, the legislature did not contemplate that we should have power, at the instance of the state, to review such questions as are in this case, either by appeal or certiorari. *State ex rel. Young v. Superior Court,* 43 Wash. 34, 85 Pac. 989; *State ex rel. Mohr v. Superior Court,* 54 Wash. 225, 103 Pac. 17.

The state claims that the case of *State ex rel. Murphy v. Brown,* 83 Wash. 100, 145 Pac. 69, is determinative in its favor of the question we are discussing. We think otherwise. The facts in that case were that one Brown was charged by information with the crime of attempting to corruptly influence an agent. The prosecuting attorney of King county claimed to have caught Brown in the act of committing the crime, and demanded of him the $1,000 which he was about to pay as a bribe, and also any papers in his possession throwing light upon the matter. In this manner the prose-

cuting attorney got possession of the money and papers. After the defendant had plead not guilty, and before the case was called for trial, he moved the court to require the prosecuting attorney to return to him the $1,000 and the papers which had been taken from him. The lower court granted this motion. The state then sued out a writ of certiorari in this court for the purpose of reviewing the action of the lower court. The question which we are discussing, to wit, the power of this court to review the action of the lower court by means of the writ of certiorari, was apparently not raised in that case—in any event, it was not decided. For that reason, if for no other, the case is not controlling here. But there is a distinction between that case and this. Here the motion was to suppress certain evidence, whereas in the *Brown* case the motion was to require the prosecuting attorney, who was an officer of the court, to turn back to the defendant certain property to which he claimed he had a right. While that proceeding grew out of a criminal action, yet the motion was in the nature of a civil proceeding. There the question concerned the right of possession of certain property; here the motion directly concerned the use of such property as evidence. That we so considered the motion in that case is indicated by the following: "As above noted, the superior court granted the motion, which was similar in its nature to that of a motion for judgment on the pleadings in a civil action."

The state also strongly contends that the case of *State ex rel. Brown v. Brinker*, 114 Wash. 47, 194 Pac. 574, supports its position here. The ruling in that case was based entirely on the case of *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053. In the *Pearson* case the facts were these: the defendant was charged with violating an ordinance of the city of Seattle. He demurred

to the information on the ground that the ordinance was void. The justice of the peace sustained his demurrer and discharged him. Thereupon the city sued out a writ of certiorari in the superior court for the purpose of reviewing the action of the justice court. The superior court held the ordinance valid and an appeal was taken from that judgment. In this court Pearson contended that certiorari would not lie in a case of that character. Discussing that question, we said: "We think, under the best authorities, this is not a *quasi* civil action, but that it is either criminal or *quasi* criminal. . . . But . . . . we think it is clear that the writ was properly issued in this case."

In the *Brinker* case, *supra,* the facts were very similar to those in the *Pearson* case. Reviewing that case, we said:

"The general rule is that, in the absence of express statutory authority permitting it, the state, in criminal proceedings, has no right of appeal, nor the right to review of a decision or judgment in a criminal case after final judgment has been rendered in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal or upon the determination by the court of an issue of law."

We also noted that the statute does not give any right of appeal from a justice court in any criminal proceeding. We, however, limited the use of certiorari in cases of that character, saying:

"For the reason that our statute (certiorari) is, as noted, broader in its scope and operation than that of other states, certiorari is permissible on behalf of the state or municipality to review the actions of the inferior courts, that is, municipal or justices' of the peace courts, where, in criminal proceedings, those courts have discharged persons charged with crime, either by erroneously setting aside the complaint, or in arresting judgment on the ground that the facts

stated in the complaint did not constitute a crime, or by committing some other material error in law not affecting the acquittal of a prisoner on the merits."

We are not disposed to broaden the scope of that opinion. It is plain that its facts are not the same as those here.

The writ is denied.

PARKER, C. J., FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 17132. *En Banc.* April 29, 1922.]

S. B. ASIA *et al., Appellants,* v. THE CITY OF SEATTLE *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS (490)—PUBLIC DEBT—SUBMISSION OF TO VOTE—OPERATIONS OF STREET RAILWAY. A city operating a street railway at a loss, cannot, without submitting the question to the voters, use its general funds in the operation of the road, where the road was acquired under Rem. Comp. Stat., §§ 8488, 8489, 8491, which authorized the city to acquire and operate the street railway through revenue derived from a special fund without incurring any general indebtedness, which was prohibited unless authorized by the voters (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 26, 1922, in favor of the defendants, in an action to enjoin the use of general funds in the operation and maintenance of a municipal railway system. Reversed.

Tucker & Hyland, Preston, Thorgrimson & Turner, and *Chadwick, McMicken, Ramsey & Rupp,* for appellants.

Walter F. Meier, Thomas J. L. Kennedy, Charles T. Donworth, and *Robert H. Evans,* for respondents.

James B. Howe, Hugh A. Tait, and *John H. Powell, amici curiae.*

[1]Reported in 206 Pac. 366.

TOLMAN, J.—Appellants, being residents and taxpayers of the city of Seattle, seek by this action to enjoin the city and its officers from the use of any of its general funds in the operation and maintenance of the street railway system which it acquired by purchase from the Puget Sound Light & Power Company, and from levying any tax for the purpose indicated. From a judgment denying the relief sought, after a trial on the merits, the case is brought here for review on appeal.

The matters involved all grow out of, and are the direct aftermath of the conditions set forth and discussed in *Twichell v. Seattle*, 106 Wash. 32, 179 Pac. 129, and reference should be had to that case for an understanding of this, and the opinion there should be read in connection with the opinion here.

This case was advanced here because of its importance to the city and its taxpayers. The record is voluminous; we have been favored with no abstract thereof, and withal, are expected to give an early decision. Under these conditions, we find it too burdensome to attempt to give an orderly and detailed statement of all the facts involved, but desire it to be understood that we have carefully considered and given due weight to such facts, disputed and undisputed, as materially affect the issues.

Following the decision in the *Twichell* case, the city completed the purchase of the street railway system under the terms therein indicated, went into possession, and proceeded to operate it. There has developed from the operation a condition which establishes beyond cavil that the city council was in error when, by Ordinance No. 39,025, considered in the *Twichell* case, it declared that, in its judgment and in the judgment of the corporate authorities, the gross revenues from

such operation would be sufficient to meet all expenses of operation and maintenance, provide for revenues previously pledged, and permit the setting aside in a special fund of amounts sufficient to meet the interest and principal of the bonds given in payment, according to the terms agreed upon; a declaration which we were then compelled to accept at its face value, and upon which the result in the *Twichell* case is based. It now appears that, aside from other deficits more or less disputed, the city, in September, 1920, in order to meet the interest upon the bonds, then due, overdrew the street railway fund, which overdraft continued into November, 1920, when it exceeded one-half million dollars, and in December, 1920, to help meet this overdraft, the city definitely and specifically borrowed $83,000 from its general fund, which was not repaid until nearly a year later, and then without interest. Such was the condition at the time this action was commenced, and that condition, if the use of the general fund for such a purpose be illegal, warranted the intervention of a court of equity. Subsequent repayment will not stay the hand of the court, especially where, as here, the city asserts the right to repeat the operation whenever it may see fit, and to pay operating and maintenance charges out of its general fund, or out of funds raised by general taxation, if it elects so to do.

The question then is, may the city voluntarily or involuntarily encroach upon its general fund, or otherwise place upon the taxpayers the burden of meeting deficits of any kind incurred by reason of the carrying out of the plan of purchase or the operation and maintenance of the system thereunder?

As recited in the *Twichell* case, Rem. Code, § 8005 (P. C. § 1214), gives to the city the right to acquire, maintain and operate street railways. Section 8006,

Rem. Code (P. C. § 1215), requires the submission of any such proposition to the voters, except in certain cases where no general indebtedness is to be incurred. [Rem. Comp. Stat., § 8488, 8489.] Section 8008, Rem. Code (P. C. § 1217), reads as follows:

"Whenever the qualified voters of any such city or town shall have heretofore adopted or shall hereafter adopt a proposition for any public utility as heretofore provided and either no general indebtedness shall have been authorized or the common council or other corporate authorities shall not desire to incur a general indebtedness, and whenever the common council or other corporate authorities of any such city or town shall be authorized to exercise any of the powers conferred by section 8005 hereof without submitting any proposition as provided in subdivision first and second of section 8006 hereof, the common council or other corporate authorities shall have power to create a special fund or funds for the sole purpose of defraying the cost of such public utility or addition, betterment or extension thereto, into which special fund or funds the common council or other corporate authorities of such city or town may obligate and bind the city or town to set aside and pay a fixed proportion of the gross revenues of such public utility, or any fixed amount out of and not exceeding a fixed proportion of such revenues, or a fixed amount without regard to any fixed proportion, and to issue and sell bonds or warrants bearing interest not exceeding six per centum per annum, payable semi-annually, executed in such manner and payable at such times and places as the common council or other corporate authorities of such city or town shall determine, but such bonds or warrants and the interest thereon shall be payable only out of such special fund or funds. In creating any such special fund or funds the common council or other corporate authorities of such city or town shall have due regard to the cost of operation and maintenance of the plant or system as constructed or added to, and to any proportion or part of the revenue previously pledged

as a fund for the payment of bonds, warrants, or other indebtedness, and shall not set aside into such special fund a greater amount or proportion of the revenue and proceeds than in their judgment will be available over and above such cost of maintenance and operation and the amount or proportion, if any, of the revenue so previously pledged. Any such bonds or warrants and interests thereon issued against any such fund as herein provided shall be a valid claim of the holder thereof only as against the said special fund and its fixed proportion or amount of the revenue pledged to such fund, and shall not constitute an indebtedness of such city or town within the meaning of the constitutional provisions and limitations. Each such bond or warrant shall state upon its face that it is payable from a special fund, naming the said fund and the ordinance creating it. Said bonds and warrants shall be sold in such manner as the corporate authorities shall deem for the best interests of the city or town, and the corporate authorities may provide in any contract for the construction and acquirement of the proposed improvement that payment therefor shall be made only in such bonds and warrants at par value thereof.

"When any such special fund shall have been heretofore or shall be hereafter created and any such obligation shall have been heretofore or shall hereafter be issued against the same, a fixed proportion, or a fixed amount out of and not exceeding such fixed proportion, or a fixed amount without regard to any fixed proportion, of revenue shall be set aside and paid into said special fund as provided in the ordinance creating such fund, and in case any city or town shall fail to thus set aside and pay said fixed proportion or amount as aforesaid, the holder of any bond or warrant against such special fund may bring suit or action against the city or town and compel such setting aside and payment." [Rem. Comp. Stat., § 8491.]

Without discussing the authorities there reviewed, or repeating the arguments of or quoting from the *Twichell* case, it is sufficient to say that we there held

that the judgment of the city council was conclusive and must be accepted by us until the contrary appeared, and therefore, by the ordinance providing for the acquisition and operation of the street railway system, no general indebtedness was created.

Unquestionably the statute means what it says, and says what it means, when it provides that no general indebtedness shall be created without the submission of that question to the voters, and that, in creating a special fund, the city shall have "due regard to the cost of operation and maintenance." Had it been contemplated that a general indebtedness might arise from the operation and maintenance, the language quoted would not have been used. *Uhler v. Olympia,* 87 Wash. 1, 151 Pac. 117, 152 Pac. 998; *Schooley v. Chehalis,* 84 Wash. 667, 147 Pac. 410.

But it is contended that we have already recognized the right of the city to borrow from one fund to temporarily relieve another. *Griffin v. Tacoma,* 49 Wash. 524, 95 Pac. 1107; *Scott v. Tacoma,* 81 Wash. 178, 142 Pac. 467; *Seymour v. Ellensburg,* 81 Wash. 365, 142 Pac. 875. The facts revealed by these cases differ radically, however, from the facts here. In the *Griffin* case, it was held that "A temporary transfer from the general fund to another fund with an assured income is not an appropriation or diversion." Neither of the other cases goes further. In the *Griffin* case the borrowing fund is described as "solvent." Here we have a special fund which owes many millions, a considerable deficit appeared almost immediately, and has steadily grown. None of the efforts of the city so far have resulted in providing an income sufficient to meet the outgo. If borrowing is continued, either directly or by overdraft, the final result will inevitably be that the moneys borrowed will be permanently diverted

from the fund to which they belong and appropriated to the use of the utility, just as certainly as though such an appropriation were directly made in the first place. That which may not be done directly must not be accomplished by indirection. When, as here, the court can certainly see a final unlawful result, it should enjoin the act by which the unlawful result will otherwise be accomplished.

We are not now concerned with questions other than the one before us, and are not called upon to advise the city how, if at all, it may solve the very serious problem which has arisen from what has proven to be the erroneous judgment of its legislative body; but we are clear that only one construction can be placed upon the statute which governs this situation, and that is that when it is proposed that any general indebtedness be incurred for such a purpose as is here considered, the matter must be submitted to the voters; and if not so submitted, all obligations arising from the acquisition, operation and maintenance of the utility must be met from its revenue, and, in any event, by no action of the city or its officials can the burden be shifted to the shoulders of the taxpayers, who have had no opportunity to say whether they will or will not accept the hazard. The trial court should have granted the prayer of appellants and enjoined the city and its officials from in any manner encroaching upon the general fund or placing the burden in any degree upon the taxpayers.

Reversed and remanded.

PARKER, C. J., MAIN, HOLCOMB, HOVEY, MITCHELL, and BRIDGES, JJ., concur.

MACKINTOSH, J. (concurring)—As was attempted to be shown in the dissenting opinion in the *Twichell* case, the declaration under which the city purchased the car system was in its very nature false, and experience has

now proved this. We should never have allowed ourselves to accept as binding the statement that one can lift himself by his own boot straps, no matter how solemnly or by whom made. I agree with the result of Judge Tolman's opinion, which I do not understand to pass directly or indirectly upon the power of the people of Seattle in any manner to now convert the obligation created by the contract of purchase into a charge upon the general fund.

FULLERTON, J. (dissenting)—I am unable to concur in this opinion. My first reason is that the question decided is moot. Contrary to the statement in the opinion, I do not find from the record that there is a deficit constantly arising from the operation of the railway system. There was such a deficit at one time, it is true, and the city used certain money of its general fund to meet it. But since that time transportation rates have been increased, and this has enabled the city not only to meet the obligations of the system as they have accrued, but to repay the money so used, and I do not find that the record shows that the earnings of the system will not take care of all of its obligations as they arise in the future. The question determined is an important one, and the court should not invite its consideration; it should consider it only after it actually arises.

My second reason is, that I think the court has reached an erroneous conclusion on the question determined. If it be that there is a constantly increasing deficit between the revenues of the railway system and its accruing obligations, the question confronting the city is one of expediency. If it cannot meet these obligations, it must abandon the plant and suffer it to go back into hands of the holders of the obligations given

for its purchase price. This must mean its ultimate abandonment. The railway cannot be operated longer as a private enterprise. If the city, with the plant freed from the burden of taxation, with power to protect it from direct competition, with power unhampered to fix rates of transportation, and with power to protect itself against extravagant losses arising from accidents, cannot make the income of the plant cover the cost of operation and upkeep, it is idle to say that a private concern, which has not these advantages, and which must make a reasonable return on its investment, if it operates at all, can do so. It is no answer to say that the operation of street railways has been profitable in the past. The argument overlooks the change in conditions. When street railways were first put in use, and for a long time thereafter, they were the sole means of transportation. Now they have an indirect competition against which there is no protection, whether publicly or privately owned. Business and professional men generally, and many mechanics and artisans, who formerly patronized the street cars, now ride to and from their homes and their places of work in their own conveyances. Private conveyances are now the adjuncts of many homes; the members of which, who formerly patronized the street cars, now ride altogether in such private conveyances. One has but to glance at the streets of any considerable city to know that the loss of patronage arising from these causes has made large inroads into the revenues of street railway systems. It is a competition that will increase rather than diminish as time goes on, and the loss of patronage caused thereby, as I understand the situation, is the principal reason why so many street car systems are now unable, with reasonable rates of fare, to make an adequate return on their investments.

But there are in all cities, and there are in the city of Seattle, many thousands of people, who live at distances from their places of work, who cannot afford these private conveyances. These, if they are not to be compelled to abandon their present residences, must have transportation of some sort at reasonable rates. This then is the city's problem; shall it continue or abandon this means of transportation. It is a question of public welfare, in which all of the people of the city are concerned, and, in my opinion, is a question which the duly chosen representatives of the city have the power to decide. If they conclude that it is to the public interest that the existing railway system be operated rather than abandoned, they have the power to operate it, even though the operation may require the use of money from the city's general fund. I can see no force in the argument that such a use of the general fund will operate indirectly to the payment of the purchase price of the system. The question, to my mind, is beyond that. The city now has control of the system and is now operating it, and the real question is, is it to the public interest that it continue to do so. If an appropriation from the public fund obligated the city in any way to pay the remainder of the purchase price a different question would arise. But it can have no such effect. If in the future it may be determined that the public interest requires the abandonment of this means of transportation and the resort to some other, the city will be at liberty to do so, unhampered by anything arising from the particular act.

If I understand the majority, I am afraid the remedy suggested is hardly available. By the fundamental laws, the power and control of municipal affairs are vested generally in elective officers; it is only special matters that are to be submitted to the electors. I can

find no law authorizing this matter to be submitted to the electors, and before it can be done, there must be additional fundamental legislation.

In my opinion, the proceedings should be dismissed.

[No. 17041. Department Two. May 1, 1922.]

In the Matter of the Application of the SOUND TRANSIT COMPANY *for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles.*[1]

CARRIERS (3)—MUNICIPAL CORPORATIONS (353) — REGULATION BY STATE COMMISSION—POWERS CONFERRED. In view of the title to the auto transportation act, providing for "additional regulation," and section 11 [Rem. Comp. Stat., § 6397] providing that the act shall not repeal any existing act, the act was not intended to repeal existing laws or to deprive a city of the power to regulate the use of its streets, directly delegated by Const., art. 11, § 11, as part of its police powers.

CARRIERS (3)—REGULATION BY COMMISSION — POWERS — CERTIFICATES OF PUBLIC NECESSITY. The director of public works may grant a certificate of convenience and public necessity to a motor transportation company which was in operation prior to January 15, 1921, and provide therein that it is subject to the ordinances of the city whose streets were part of the route; notwithstanding, Rem. Comp. Stat., § 6390, makes the certificate a matter of right as to companies in operation prior to such date; since such companies are not free from all regulations in view of Id., § 6389, which confers upon the director of public works power and authority to supervise and regulate auto transportation companies.

Cross-appeals from a judgment of the superior court for Thurston county, Wilson, J., entered January 3, 1922, setting aside an order and certificate issued to a carrier by the director of public works. Reversed on appeal of director of public works.

[1]Reported in 206 Pac. 931.

W. R. Crawford and *Morris B. Sachs,* for appellant Sound Transit Company.

The Attorney General and *Raymond W. Clifford, Assistant,* for cross-appellant Department of Public Works.

Walter F. Meier and *Thomas J. L. Kennedy, amici curiae.*

MAIN, J.—This is an appeal from a judgment of the superior court of Thurston county, setting aside an order and certificate issued by the director of public works to the Sound Transit Company, a corporation. From the judgment, the Sound Transit Company appeals, and the director of public works prosecutes a cross-appeal. Upon the appeal of the Sound Transit Company is presented the question whether, when the superior court sets aside a portion of an order and certificate entered by the director of public works which had been taken before that court for review, the judgment should set aside the entire order. The principal question upon the cross-appeal is whether the order entered and the certificate issued by the director of public works were valid in their entirety.

We will first consider the question presented upon the cross-appeal, because, if we sustain the order and certificate as entered by the director, the question which is presented upon the Sound Transit Company's appeal becomes immaterial. On October 8, 1921, the Sound Transit Company presented a petition to the department of public works asking that a certificate be issued to it which would authorize the carrying of passengers by means of motor propelled vehicles between Roosevelt Heights and Seattle, Washington. Thereafter an order was entered and a certificate issued which authorized that company to carry passengers

for hire between the points mentioned. Both the order and the certificate contained limitations or provisions which were in substance the same. These, as recited in the certificate, are as follows:

"This Certificate authorizes passenger service by means of motor propelled vehicles between Roosevelt Heights and Seattle, Washington, entering the city limits of Seattle at Ravenna and 65th Streets and is subject to the ordinances of the said city now in effect or which may hereafter become effective, governing the operating of motor vehicles upon the streets of said city."

Roosevelt Heights is beyond the city limits and it was desired to carry passengers from that point to the business section of the city of Seattle. The application was based upon a provision in § 4 of the Transportation by Motor Vehicle Act. Laws of 1921, ch. 111, p. 338. It is the contention of the Sound Transit Company that, under this act, since that company, prior to January 15, 1921, had been operating motor vehicles for hire, it was entitled to an order and certificate without limitation or qualification. Section 4 of the act after stating that no auto transportation company shall hereafter operate for the transportation of persons between fixed termini without first having obtained a certificate declaring that public convenience and necessity require such operation, provides:

". . . . . but a certificate shall be granted when it appears to the satisfaction of the commission that such person, firm or corporation was actually operating in good faith, over the route for which such certificate shall be sought on January 15th, 1921." [Rem. Comp. Stat., § 6390.]

It is upon this quoted provision that the Sound Transit Company relies to sustain its position. The question then is whether, by this provision of the statute,

the Sound Transit Company has a right to operate motor propelled vehicles, since it was operating prior to January 15, 1921, without regulation or control of the director of public works and without regard to the ordinances of the city of Seattle. Under § 11, art. XI, of the constitution of this state, the city is authorized to make and enforce within its limits all local police, sanitary and other regulations which are not in conflict with general laws. It has been held that this is a direct delegation of a police power as amply within its limits as that possessed by the legislature, and that so long as the subject-matter is local and the regulation reasonable, an ordinance is valid unless inconsistent with the general laws of the state. In *Detamore v. Hindley,* 83 Wash. 322, 145 Pac. 462, it was said:

"The state constitution, § 11 of article 11, provides: 'Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws."

If the Transportation by Motor Vehicle Act is not inconsistent with the power of the city to regulate the use of its streets, it does not supersede that right which the city possessed. The title to the act states that it is "An Act providing for the additional supervision and regulation of the transportation of persons and property for compensation over any public highway by motor propelled vehicle: . . . . ." Section 11, which is the last section of the act, provides:

"This act shall not repeal any of the existing law or laws, relating to motor propelled vehicles, their owners

or operators, or requiring compliance with any condition for their operation." [Rem. Comp. Stat., § 6397.]

It thus plainly appears, as indicated by the title and as provided in the body of the act, that it was not the intent of the legislature that the act should supersede other laws and regulations relating to motor propelled vehicles, but that it was to be considered as an act in addition to those already in existence. The use to which the Sound Transit Company purposed putting the streets of Seattle is not their ordinary and customary use, but a special one and one for which they were not primarily constructed. As to such a user the power of the municipality is plenary, unless it has been deprived of that power by an act of the legislature. As said in *Allen v. Bellingham,* 95 Wash. 12, 163 Pac. 18, and subsequently quoted with approval in *State ex rel. Schafer v. Spokane,* 109 Wash. 360, 186 Pac. 864, relative to the right of the use of the streets of the city by a motor propelled vehicle for hire:

"But the use to which the appellant purposes putting the streets is not their ordinary or customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed. As to such users we think the power of the municipality is plenary, in so far as this particular clause of the statute is concerned. It denies no form of regulation pertaining to business of this character, even to the prohibition of the business entirely." (*Allen v. Bellingham,* 95 Wash. 12, 163 Pac. 18.)

Before we hold that the legislature has taken from the city the power to regulate and control the use of its streets, it will be necessary for the legislature to pass an act to that effect which makes its meaning plain and unequivocal. As already stated in our opinion, the legislature manifested no such intent in the passing

of the act of 1921. The city having the power after the passage of this act to regulate and control the use of its streets, the question arises as to whether the director of public works, in placing the limitation in the order and certificate, exceeded the power and jurisdiction of that department. While under § 4 of the Transportation by Motor Vehicle Act (p. 341) the Sound Transit Company was entitled to a certificate, it does not follow that it is free in the operation of its motor vehicles from any regulation or control. Section 3 of the act (p. 340) [Rem. Comp. Stat., § 6389] confers upon the director of public works, among other things, power and authority to supervise and regulate auto transportation companies. In the exercise of its power it was within the province of the director of public works to provide in the order and certificate that the motor propelled vehicles of the Sound Transit Company should be operated subject to the ordinances of the city. The fact that the Sound Transit Company was in operation prior to January 15, 1921, and was therefore entitled to a certificate as a matter of right, does not give it, under any proper construction of the law, the right to operate free from any regulation or control by making use of the streets of the city without reference to its ordinances and regulations, and without regard to any regulations of the department of public works.

Our attention is especially called to the case of the *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892, as sustaining the contention of the Sound Transit Company that the Motor Vehicle Act has abrogated the power of the city to regulate its streets by ordinance so far as relates to motor propelled vehicles. In that case the question was whether the public service commission law, which conferred upon the commission the power to regulate the service which the street car

should render, took from the city such power prior to the time that the commission had acted. It was there conceded by the city that the provisions of the law conferred the power of regulation upon the commission, but it was contended that, until such time as the commission acted, the city council retained jurisdiction to regulate street railways as to the number of passengers which a car should carry and the schedule in accordance with which the cars should be operated. It was there held that the legislature had taken from the city the power to regulate and control street railways in the respect mentioned prior to the time that the commission had acted. That holding was based on the provisions of the act then under consideration. The act there involved at least differs from the present in two very material respects: There was no recital in the title that it was additional supervision and regulation, and there was no provision in the body of the act providing that it should not repeal any existing law or laws relating to the subject-matter which it covered. As already pointed out, the law here involved embodies both of these features and is indicative of a legislative intent not to supersede the power of the city to regulate and control the use of its streets. The case of *Allen v. Bellingham, supra,* and *State ex rel. Schafer v. Spokane, supra,* so far as they have any bearing, tend rather to support the position of the director of public works in the present case than that of the Sound Transit Company. In each of those cases it was held that the state had not by general law taken from the cities the power to regulate the control and use of jitney busses within their limits. In the case of *State ex rel. Webster v. Superior Court,* 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287, it was held that telephone rates fixed by ordinance

granting the franchise could be altered or annulled by a subsequent act of the legislature, and has no controlling effect upon the disposition to be made of the present case. The question as to whether a void provision in an order or certificate by the director of public works, when taken before the superior court and set aside, avoids the entire order or only the illegal part is not necessary for the determination of the present case, as we view it, and that question will not be here discussed or determined.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment affirming the order entered and sustaining the certificate issued by the department of public works.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16763. Department One. May 1, 1922.]

N. P. HANSEN *et al.*, *Appellants*, v. P. T. LEE, *Respondent*.[1]

SCHOOLS AND SCHOOL DISTRICTS (21-1)—ACQUISITION AND USE OF PROPERTY—TEACHERS' DWELLINGS—STATUTES. Rem. Code, §§ 4481, 4486, 4493, 4532, 4538 and 4539 of the school code [Rem. Comp. Stat., §§ 4776, 4782, 4789, 4829, 4835 and 4836] do not give school districts of the third class any authority to erect dwellings for the use of school teachers.

SAME (21-1). Under the special act, Rem. Comp. Stat., §§ 4837–4840, authorizing school districts of the second or third class to carry out the communal functions set forth in § 4837, one of which is "to provide suitable dwellings for teachers," only school districts intending to carry out such functions are entitled to erect dwellings for school teachers.

SAME (21-1). An allegation that a school district had erected a dwelling house for teachers in conformity with the communal district act [Rem. Comp. Stat., §§ 4837–4840] is sufficient, as against a general demurrer, to show that the district was attempting to

[1]Reported in 206 Pac. 927.

come within the provisions of the law, and so was authorized to erect a dwelling for teachers.

SAME (21-1). Rem. Comp. Stat., § 4839, of the communal school act, providing that the supervisors of a school district intending to assume the functions mentioned in Id., § 4837, including the power to erect dwellings for teachers, must approve the plans of any district for carrying out the act, has reference to the general plans for putting in force the general purposes of the act, and does not require that the supervisors approve the plans of the dwelling to be constructed.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 20, 1921, upon sustaining a demurrer to the complaint, dismissing an action for a writ of mandate to compel the issuance of a warrant. Reversed.

C. T. Roscoe and *Joseph H. Smith,* for appellants.

Thos. A. Stiger, for respondent.

BRIDGES, J.—The amended complaint in this case alleged that school district No. 11, in Snohomish county, is of the third class, and that R. T. Jones, C. M. Morgan and W. H. Young are its directors; that the defendant is the county auditor of Snohomish county; that in April, 1920, the board of directors of the district submitted to the qualified voters of that district, at an election duly called and held, the question whether a cottage or dwelling for the use of school teachers should be constructed on the premises belonging to the school district; that this election was in all respects according to law; that the people of the district voted almost unanimously for the levy of taxes sufficient to erect the cottage; that, after the election, the board of directors certified to the county commissioners the amount necessary to be raised by taxes for the purpose mentioned, and that thereafter the commissioners levied such taxes; that, after the election, the board of directors of the district called for bids for the erection

of the dwelling, and that such call was in all respects according to law; that the plaintiffs, Hansen and Byl-ling, were the lowest bidders and the contract was let to them for the sum of $1,484; that thereafter the contractors completed the building according to plans and specifications, and it was accepted by the directors; that, during the course of construction, the board had given to the contractors a voucher for $1,000, on account of such construction, and that upon presenting the voucher to the county auditor, he drew his warrant on the county treasurer for the amount thereof; that, after the completion of the building and its acceptance, the board of directors gave to the contractors a voucher for the balance, to wit, $484; that, although they presented to the auditor such voucher and demanded a warrant be drawn in their favor, he refused so to do; that the taxes levied for the construction of the house were collected and paid into the treasury of the county; that since the enactment of ch. 129, Laws of 1913, p. 395, it has been the settled policy of the department of education of the state of Washington to encourage school districts of the third class to erect and maintain suitable dwellings for school teachers, and that in many such districts such dwellings have been built; that "the plaintiff, school district No. 11, erected said teachers' cottage in conformity with ch. 129, Laws of 1913," and with the approval of the county superintendent of Snohomish county and the state superintendent of public instruction.

The defendant demurred to the amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The court sustained this demurrer, and the plaintiffs having refused to further plead, a judgment was entered dismissing the action. They have appealed from that judgment.

The sufficiency of the amended complaint is the only question before us. The respondent contends that the general school code does not give districts of the third class any power to build dwellings for teachers; that if such districts have such power, it must be found in ch. 129, Laws of 1913, p. 395; that if it be conceded that act gives such power, the complaint fails to show that the plans for the building were presented to, and approved by, the board of supervisors, as required by such act. On the other hand, the position of the appellants is that the district was given this power by both the general school code and the 1913 act; that, if such power be found only in the 1913 act, it was not necessary to present the plans of the house to the board of supervisors; that, in any event, the people of the district have authorized the house, are now using it, and the district should pay for it.

Aside from ch. 129, Laws of 1913, p. 395 [Rem. Comp. Stat., §§ 4837-4840], the sections of the code pertaining to the powers of school districts of the third class and their directors are as follows: 4481, 4486, 4493, 4532, 4538, and 4539, Rem. Code. [Rem. Comp. Stat., §§ 4776, 4782, 4789, 4829, 4835, 4836.] It is not necessary to cite authorities to support the statement that school districts and their directors have only such powers as are by statute given them. A careful reading of all of the provisions of statutes affecting this question (except ch. 129, Laws of 1913, p. 395) shows that they do not, either expressly or by reasonable implication, grant any power or authority to school districts of the third class, or to their board of directors, to erect dwellings for the use of school teachers. We must, therefore, hold that if such districts have any such power or authority it must be found in ch. 129, Laws of 1913, p. 395.

Section 1 of that chapter (Laws of 1913, p. 395) reads as follows:

"That school boards in each district of the second class and third class may provide for the free, comfortable and convenient use of the school property to promote and facilitate frequent meetings and association of the people in discussion, study, improvement, recreation and other community purposes, and may acquire, assemble and house material for the dissemination of information of use and interest to the farm, the home and the community, and facilities for experiment and study, especially in matters pertaining to the growing of crops, the improvement and handling of live stock, the marketing of farm products, the planning and construction of farm buildings, the subjects of household economies, home industries, good roads, and community vocations and industries; and may call meetings for the consideration and discussion of any such matters, employ a special supervisor, or leader, if need be, and provide suitable dwellings and accommodations for teachers, supervisors, and necessary assistants." [Rem. Comp. Stat., § 4837.]

Section 2 (Laws of 1913, p. 396) authorizes such districts to:

". . . . . reconstruct, remodel, or build school houses, and to erect, purchase, lease or otherwise acquire other improvements and real and personal property, and establish a communal assembly place and appurtenances, and supply the same with suitable and convenient furnishings and facilities for the uses mentioned in section 1 of this act." [Rem. Comp. Stat., § 4838.]

Section 3 (Laws of 1913, p. 396) provides:

"That plans of any district or combination of districts for the carrying out of the powers granted by this act shall be submitted to and approved by the board of supervisors composed of seven members, . . ." [Rem. Comp. Stat., § 4839.]

This section then proceeds to point out how the members of the board shall be chosen.

This act of 1913 is a special one. Its purposes are to authorize school districts to do and perform the various functions mentioned in § 1 of the act. Any school district of the second or third class desiring to perform the functions outlined in this chapter is authorized, for the purpose of carrying out such functions, to do certain things, and, among others, to "provide suitable dwellings and accommodations for teachers, supervisors and necessary assistants." Only school districts intending to carry out the functions of ch. 129 are authorized to build homes for teachers. The amended complaint alleges that this house was constructed in conformity with ch. 129, Laws of 1913, p. 395. We think that allegation is sufficient, as against a general demurrer, to show that the district was attempting to come within the provisions of that law. We hold, therefore, that the amended complaint shows power and authority in the district to construct dwellings for teachers.

It is stated in the briefs, although it does not elsewhere appear, that the trial court came to the same conclusion to which we have come, but sustained the demurrer to the amended complaint for the reason that it did not allege that the plans and specifications for the dwelling had been submitted to, and approved by, the board of supervisors composed of seven members. It is our opinion that this is not required by the 1913 law. Section 3 of that act (p. 396) provides that: ". . . . . plans of any district . . . . . for the carrying out of the powers granted by this act . . . . ." shall be submitted to, and approved by, the board of supervisors. It is not the plans of buildings which must be submitted to the board, but the gen-

eral plans for carrying out and putting in force the general purposes of the act. The act contemplates that the board of directors of the district shall determine whether the district will come within the provisions of this act, and, if so, also determine the ways and means for accomplishing the purposes therein mentioned. These are the "plans" which must be submitted to the supervisors.

If the appellants at a trial of this action can show that the district was constructing this dwelling for the purpose of performing the duties and functions provided in the 1913 act, then the writ asked for should be granted; otherwise it should be denied.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer to the amended complaint.

Parker, C. J., Fullerton, Tolman, and Mitchell, JJ., concur.

[No. 16810. Department Two. March 23, 1922.]

THE STATE OF WASHINGTON, *on the Relation of H. L. Wilson et al., Plaintiff*, v. E. L. LINDLEY *et al., as County Commissioners, Respondents.*[1]

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered January 10, 1921, denying a writ of mandamus. Affirmed.

W. G. Coleman and *John C. Hurspool*, for relator.
A. F. Appleton, for respondents.

PER CURIAM.—The appellants sought by mandamus to compel the county commissioners of Columbia county to approve a bill for extra work performed by them in the construction of a certain portion of the Inland Empire highway, in order that it might be paid by the state auditor out of the permanent highway fund. The allegation of their complaint is that they were required to deliver 2547 cubic yards of crushed rock, being 472 cubic yards more than was called for by the contract. The trial court found:

"That no strict and accurate measurement of all crushed rock was kept by the plaintiffs using the proper guage therefor at the bunkers; that said plaintiffs were not called upon nor did they actually furnish 472 cubic yards, extra of crushed rock for such highway, or any crushed rock which they were required to furnish under said contract; that they did not furnish any crushed rock for said highway for which they have not been paid under the terms of said contract;"

Our conclusion from the testimony is that it confirms this finding. The appellants failed to introduce sufficient evidence substantiating their claim, and not sustaining the burden of proof the law imposed upon them, they are not entitled to the relief they seek.

Affirmed.

[1]Reported in 205 Pac. 10.

[No. 16877. Department Two. March 24, 1922.]

CLAUDE E. IMUS *et al.*, *Appellants*, v. W. C. REEDER and REEDER INVESTMENT COMPANY, *Respondents*.[1]

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 3, 1921, upon granting a nonsuit, dismissing an action for fraud, tried to the court and a jury. Affirmed.

Charles P. Lund and *Dodds & Dodds*, for appellants.
Wm. O. Lewis, for respondents.

MACKINTOSH, J.—In 1910, the appellants purchased from the respondent corporation 2,000 shares of capital stock in an irrigation and power company, and gave in exchange therefor certain property. This is an action to recover the value of that property, upon allegations of fraud, it being alleged that the respondents induced the sale by misrepresentations of the value of the stock, the assets of the company, and the property owned by it, and false statements as to what it intended to do in the way of constructing a dam and putting water upon land in the vicinity. The action was begun in November, 1919. The answer was a general denial and an affirmative allegation that the suit is barred by the statute of limitations. The case was tried before a court and jury. At the end of plaintiffs' case, the defendants made a motion to dismiss upon the ground that the testimony did not establish the defendants had made any fraudulent representations or misrepresentations, and on the further ground that, if any false statements were made, they were by way of being expressions of expectation of what might be accomplished in the future; and third, that the action had been barred by the statute of limitations, which provides that actions for misrepresentations and fraud shall be brought within three years. Section 159, Rem. Code (P. C. § 8166). The motion for dismissal was granted and judgment was entered in favor of defendants.

In passing upon the motion to dismiss, the court evidently based his ruling upon the question of the statute of limitations. The appellants argue that there was sufficient evidence in the case to make that a question of fact for the jury to determine, and they cite *McDonald v. McDougall*, 86 Wash. 339, 150 Pac. 625, arguing that that case holds it to be a question of fact for the jury to determine whether or not the plaintiff knew, or should have known, that he had been defrauded, more than three years prior to the beginning of the action.

"If he did know, or if he should have known, as a person reasonably diligent in looking after his affairs, he is now too late to maintain the action."

[1]Reported in 205 Pac. 380.

Of course, if the converse is true, the action is timely brought.

If the question of the statute of limitations were the only question upon which the motion to dismiss was based there might be some need of going minutely into the evidence on the question whether the appellants, under all the circumstances, should be held to have had notice of what they now allege to have been fraudulent conduct within three years before they began their action, and to determine whether the evidence against it was so conclusive as to warrant the court in holding, as a matter of law, that they were barred; but, under the facts of this case, it is unnecessary to determine this question, for a careful reading of them is conclusive, to our mind, that the testimony totally failed to establish any misrepresentations or fraud which are actionable. A recitation of these facts is needless, as they are of no interest except to the parties litigant, and can serve no useful purpose in future controversies between other parties. We will satisfy ourselves with this statement and affirm the judgment.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16979. Department Two. March 28, 1922.]

NORRIS SAFE & LOCK COMPANY, *Respondent*, v. FARMERS' & MERCHANTS' BANK, *Appellant*.[1]

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered May 9, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

E. Eugene Davis and *B. C. Mosby*, for appellant.
W. W. Clarke, for respondent.

PER CURIAM.—This was an action to recover the value of a safe door, which was defended on the ground that the purchase by the appellant was induced by the respondent's fraudulent misrepresentations.

The record presents only a question of fact, which was determined by the trial court adversely to the appellant, which decision we affirm for the reason that the evidence does not preponderate against the conclusion of the trial judge.

[1]Reported in 205 Pac. 12.

[No. 16894. Department One. April 8, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD ELLWANGER, *Appellant*.[1]

Appeal from a judgment of the superior court for Island county, Bell, J., entered June 27, 1921, upon a trial and conviction of rape. Affirmed.

James Zylstra, for appellant.
John C. Richards, for respondent.

TOLMAN, J.—Appellant was tried and convicted on the charge of carnally knowing a female child under the age of eighteen years, not his wife.

Upon this appeal his only assignment of error is to the effect that the verdict of guilty was contrary to, and not supported by, the evidence, and therefore his motion for a new trial should have been granted.

We have carefully read and considered all of the evidence in the case, which it is unnecessary to now detail, and find it amply sufficient to support the verdict.

The judgment is therefore affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16858. Department One. April 10, 1922.]

IDA M. STOLZE, *Appellant*, v. C. R. STOLZE *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered April 22, 1921, upon findings in favor of the defendants, in an action to cancel an assignment of contracts, and for other relief, tried to the court. Affirmed.

P. L. Pendleton, for appellant.
Guy E. Kelly and *Thomas MacMahon*, for respondents.

BRIDGES, J.—At the time of his marriage to the plaintiff, the defendant C. R. Stolze was the owner of certain real estate. Some years after his marriage, he entered into three separate contracts for the sale of such real estate to three separate parties. A part of

[1]Reported in 206 Pac. 1118.

the purchase price was paid by them in cash and the balance was to be paid in monthly installments. At the time of the execution of the contracts, three several deeds were made to the contract purchasers. These contracts and deeds were placed in escrow with the defendant North Pacific Bank, with power to collect the deferred payments provided for in the contracts, and when all such payments had been made, to deliver the several deeds to the persons respectively entitled to them. Thereafter the defendant C. R. Stolze assigned these contracts to Florence Burns, his daughter by a prior marriage. It would appear that the purpose of this action was to cancel and annul the assignments to Florence Burns of the three contracts, and for judgment against the defendant C. R. Stolze in various sums of money collected by him on account of such contracts, and on account of wages earned by him subsequent to his marriage with the plaintiff. After the commencement of this action, but before the trial of it, the defendant Stolze had begun suit against his wife, the plaintiff, for divorce. In that action Stolze was awarded a decree of divorce. The record shows that, in the early stages of this action, the plaintiff obtained a judgment by default against the defendants, and that the defendants instituted an action to set aside and vacate that judgment. On appeal we determined that such previous decree had been unlawfully entered because of lack of jurisdiction. *Stolze v. Stolze*, 111 Wash. 697, 191 Pac. 644. It further appears that the decree in the divorce action contained the following clause:

"It is further decreed, that in the event that the supreme court of the state of Washington should decide (in the case above mentioned) that there is property belonging to the community composed of plaintiff and defendant, the said question now being on appeal to the said supreme court and now pending therein, that the defendant shall have the right to apply to the court (in the divorce action) for a further and equitable share thereof, and attorneys' fees, jurisdiction for such purposes being hereby expressly reserved."

After the trial of this case, the court made findings of fact to the effect that the defendant C. R. Stolze was the owner in his separate right of all the real estate involved, and that the plaintiff, Mrs. Stolze, had no interest therein, and that the assignment of the several contracts for the sale of such property to the defendant Florence Burns was a valid and lawful assignment, and vested the title to such contracts in Florence Burns, free and clear of any rights of Mrs. Stolze thereto. The court further recites the facts concerning the divorce suit and the vacating and setting aside by this court of the judgment previously rendered in this action, and made a judgment to the effect that C. R. Stolze, at all times, was the owner of the tracts of land in his separate right, and that Florence Burns was the owner of the contracts for the sale of the lands, and that the plaintiff has no interest either in the lands or

the contracts. The judgment further provided that the decree in the divorce suit bars the plaintiff here from litigating any alleged rights which accrued during or by virtue of the marriage relation, except the matters expressly reserved by the court in the decree of divorce, and that nothing in the judgment in this action shall be construed to be a bar to the plaintiff's application to the court in the divorce proceeding to establish a community interest in other property than the property particularly involved in this action.

The questions involved here are complicated chiefly because of the many suits between the parties to this action, and we do not see any good to be accomplished by going into further details concerning the facts. Suffice it to say that a reading of the record convinces us that the judgment of the lower court was sustained by the evidence and should be affirmed. It is so ordered.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16857. Department One. April 10, 1922.]

IDA M. STOLZE, *Appellant*, v. C. R. STOLZE *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered April 22, 1921, upon findings in favor of the defendants, in an action to cancel an assignment of contracts, and for other relief, tried to the court. Affirmed.

P. L. Pendleton, for appellant.

PER CURIAM.—It is stated in appellant's brief that this case involves the same parties, facts, testimony and questions of law contained in the case of *Stolze v. Stolze*, *ante* p. 701, 206 Pac. 1118. On the strength of that case, the judgment in this one is affirmed.

[1]Reported in 206 Pac. 1119.

[No. 16873. Department One. April 27, 1922.]

ROBERT KNAPP, *Respondent*, v. FERDINAND HAGGMAN, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Ralston, J., entered July 1, 1921, upon findings in favor of the plaintiff, in an action of ejectment, tried to the court. Affirmed.

Dwight N. Stevens and *Jones & Colvin*, for appellant.
S. D. Wingate and *F. R. Benz*, for respondent.

MITCHELL, J.—The plaintiffs, the owners of lot 3, block 67, Plat of Central Seattle, as laid off by James McNaught and Agnes McNaught, his wife, brought this action against the defendant, the owner of the adjoining lot 4, to recover possession of lot 3, alleged to be wrongfully withheld from the plaintiffs by the defendant. By an affirmative defense there was, in effect, a disclaimer as to all of lot 3 except a small strip of it adjoining lot 4, which strip it was alleged was the property of the defendant by adverse possession. This right by adverse possession was denied by the reply. Upon a trial without a jury, there were findings and judgment entered that the plaintiffs were the owners of, and entitled to, all of lot three, and that none of it had been acquired by the defendant by adverse possession. The defendant has appealed.

The facts, as presented by the statement of facts, are exceedingly meager and rather unsatisfactory as to information or knowledge of the witnesses who testified upon the issue made by the pleadings. An examination of the record leads us to an endorsement of the findings made by the trial judge and of the judgment entered as correct in the case.

Affirmed.

PARKER, C. J., FULLERTON, HOLCOMB, and HOVEY, JJ., concur.

[1]Reported in 206 Pac. 1117.

INDEX

Abandonment:

Of rights under contract, see CONTRACTS, 5.
Of leased premises, see LANDLORD AND TENANT, 5.

1. ABANDONMENT—REAL PROPERTY—EFFECT ON TITLE. Perfect legal title to real property is not lost by abandonment. *Cameron v. Bustard* 266

Abatement and Revival:

Election of remedy, see ELECTION OF REMEDIES.
Judgment as bar in another action, see JUDGMENT, 1-7.

Abstracts:

Costs for on appeal, see COSTS.

Acceptance:

Of benefits as ratification of act of agent, see DEEDS.
Of goods sold, in general, see SALES, 2-4.

Accident:

To passenger in automobile, see CARRIERS, 6, 7.
From defects in county road, see HIGHWAYS.
To servant or third person, see MASTER AND SERVANT.
To person in city street, see MUNICIPAL CORPORATIONS, 2-14.
Collision at street crossing, see STREET RAILROADS.

Accomplices:

Criminal responsibility, see CRIMINAL LAW, 12.

Account:

Right to trial by jury in partnership accounting, see JURY.
Between partners, see PARTNERSHIP, 2.
Issues and proof under general denial in action for accounting, see PLEADING, 9.

Accretion:

In water course, see WATERS AND WATER COURSES, 4, 5.

Accrual:

Of right of action, see LIMITATION OF ACTIONS.

Acquiescence:

Of accused as admissions, see CRIMINAL LAW, 4.

Action:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BILLS AND NOTES.
Enforcement of agreement to arbitrate, see ARBITRATION AND AWARD.
Dissolution of attachment, see ATTACHMENT.
Injuries to passengers, see CARRIERS, 6, 7.
For breach of contract, see CONTRACTS.
By or against corporations, see CORPORATIONS.
On contract for services, see COUNTIES.
For divorce, see DIVORCE.
For recovery of real property, see EJECTMENT.
Election of remedy, see ELECTION OF REMEDIES.
Taking of or injury to property in exercise of power of eminent domain, see EMINENT DOMAIN.
Supplementary proceedings, see EXECUTION.
By or against executors and administrators, see EXECUTORS AND ADMINISTRATORS.
For unlawful detainer of premises, see FORCIBLE ENTRY AND DETAINER.
For fraud, see FRAUD.
Injuries from defect in highways, see HIGHWAYS.
By or against husband or wife, see HUSBAND AND WIFE.
For separate maintenance, see HUSBAND AND WIFE, 5.
On insurance policy, see INSURANCE, 3.
Bar by former adjudication, see JUDGMENT, 1-7.
On judgment in general, see JUDGMENT, 8.
Actions in which jury trial may be had, see JURY.
Injuries for negligence of landlord, see LANDLORD AND TENANT, 3, 4.
Unlawful detainer of leased premises, see LANDLORD AND TENANT, 6.
Limitation by statute, see LIMITATION OF ACTIONS.
By servant for personal injuries, see MASTER AND SERVANT, 1-7, 10.
Foreclosure of mechanics' lien, see MECHANICS' LIENS.
Foreclosure of mortgage, see MORTGAGES, 2, 3.
For injuries from automobiles in streets, see MUNICIPAL CORPORATIONS, 2-14.
For defects in water pipes, see MUNICIPAL CORPORATIONS, 15, 16.
By or against firms, see PARTNERSHIP.
For malpractice, see PHYSICIANS AND SURGEONS, 4.
Determination of adverse claims to real property, see QUIETING TITLE.
Breach of contract, see SALES.
Against street railroads for personal injuries, see STREET RAILROADS.
Contesting payment of inheritance tax, see TAXATION, 4, 5.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 1-3.
Recovery of price paid for land, see VENDOR AND PURCHASER, 2.
Determination of water rights, see WATERS AND WATER COURSES.

1. ACTIONS (14)—FORM—CONTRACT OR TORT. The distinction between forms of action having been abolished, an action for the loss

Action—Continued.

of a crop wrongfully removed by defendants' tenant, after defendants' sale to plaintiff, is susceptible of interpretation as one for breach of covenant; and will therefore not be dismissed as one in tort for conversion for failure to join the tenant. *Miller v. Smith* 163

2. ACTIONS (27-1)—JUDGMENT (213-1)—CONSOLIDATION—CONCLUSIVENESS—CAUSES BARRED—EXTENT OF RELIEF. Where two actions were consolidated, an order of dismissal with prejudice, disposes of both actions, which are considered as one, and bars another action on either cause. *Vasicsko v. Kundrak*..... 215

Adequate Remedy at Law:

Adequacy of remedy by appeal, see CERTIORARI, 1.

Adjudication:

Operation and effect of former adjudication, see JUDGMENT, 1-7.

Adjutant General:

Authority to make addition to armory, see STATES.

Administration:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Admissions:

As evidence in criminal prosecutions, see CRIMINAL LAW, 4.
By motion for judgment on pleadings, see PLEADING, 7.

Advancements:

Interest on advances, see PARTNERSHIP, 2.

Adverse Possession:

1. ADVERSE POSSESSION (26, 31, 41)—HOSTILE ENTRY—CLAIM OF RIGHT—EVIDENCE—SUFFICIENCY. There was no entry upon vacant real estate under a claim of right which could ripen into title by adverse possession, by one who, contemplating the acquisition of title by tax foreclosures, sought from the owner and her agent permission to enter upon and occupy the premises, and receiving no reply, moved in and made improvements, later acquiring tax certificates and filing a complaint in foreclosure in which it was alleged that the true owner was "the owner" of the premises and had abandoned the same. *Cameron v. Bustard*..... 266

Affidavits:

See ATTACHMENT.
As part of record on appeal, see APPEAL AND ERROR, 11, 12.
Of jurors on motion for new trial, see NEW TRIAL, 5.

Agency:

See PRINCIPAL AND AGENT.

Agreement:

See CONTRACTS.

Agriculture:

Condemnation of waters for domestic use of farm, see EMINENT DOMAIN, 1-3.
Irrigation, see WATERS AND WATER COURSES, 1-3, 6-8.

Alimony:

Separate maintenance, see HUSBAND AND WIFE, 5.

Amendment:

Mechanics' lien claim, see MECHANICS' LIENS, 8.
Bringing in new parties, see PARTIES.
Of pleading, see PLEADING, 4-6.

Answer:

In pleading, see PLEADING, 1, 3, 6, 8, 9.

Appeal and Error:

Existence of remedy by appeal as bar to certiorari, see CERTIORARI, 1.
Costs on appeal, see COSTS.
Criminal appeals, see CRIMINAL LAW, 20-25.
Reversal as affecting force of judgment as an adjudication, see JUDGMENT, 2, 5.
New action after reversal of former action, as affecting limitation, see LIMITATION OF ACTIONS, 2.

III. DECISIONS REVIEWABLE.

1. APPEAL (18, 30)—COUNTIES (22)—DECISIONS APPEALABLE—DISCRETION. The action of the board of county commissioners in ordering the establishment of a drainage district upon application therefor and in refusing a rehearing thereafter, being an exercise of the discretion reposed in the board, is not reviewable on appeal. *In re Drainage District No. 10, King County*..... 8

2. APPEAL (45)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS. An order refusing to strike interrogatories being interlocutory, no appeal lies therefrom in advance of appeal from the final judgment. *State Bank of Goldendale v. Beeks*..... 42

IV. RIGHT TO APPEAL.

3. APPEAL (102)—RIGHT TO APPEAL—CESSATION OF CONTROVERSY—LAPSE OF TIME. Where a business license expires pending appeal from a judgment determining the rights of the parties in an action

Appeal and Error—Continued.

to restrain the city from revoking the license, the question becomes a moot one which the supreme court will not decide nor entertain for the purpose of determining costs. *Sayles v. Seattle*..... 12

4. Appeal (102)—Right to Appeal—Cessation of Controversy. An appeal from a writ of mandate requiring the admission of a pupil who had been excluded from school for eighteen days, becomes a moot question, when not heard until after the expiration of the period. *State ex rel. Lehman v. Partlow*..... 316

V. PRESERVATION OF GROUNDS.

5. Same (131)—Preservation of Grounds—Objections to Findings. Under Rule 23 of the superior court, requiring three days' notice of the signing of findings of fact, except in case of emergency, the emergency will be presumed where the trial court made findings without notice, especially where no motion was made below to vacate. *Hub Mercantile Co. v. Stingle*..... 607

6. Same (136)—Preservation of Grounds—Exceptions to Findings. In the absence of exceptions to findings, the facts cannot be considered. *Hub Mercantile Co. v. Stingle*..... 607

7. Appeal (142)—Exceptions to Instructions. Error cannot be predicated upon the giving of instructions to which no exceptions were taken. *Polisky v. Puget Sound Electric R*..... 72

8. Appeal (145)—Preservation of Grounds—Exceptions to Findings—Necessity. Where exceptions are not taken to findings of fact as signed by the judge, and no error is predicated upon the exclusion of testimony, the statement of facts will be stricken from the record on motion therefor. *Mullins Saw Mill Co. v. Woolfolk* 55

9. Same (151½). An application to incorporate exceptions to findings in the record must first be made to the trial court. *Hub Mercantile Co. v. Stingle*..... 607

10. Appeal (151½)—Preservation of Grounds—Timely Exceptions and Manner of Taking. Exceptions to findings of fact, not taken within five days after notice of the findings, as required by Rem. Code, § 383, will be struck out on motion. *Hub Mercantile Co. v. Stingle* 607

X. RECORD.

11. Appeal (272)—Record—Affidavits. Evidentiary affidavits used on a motion to discharge or sustain an attachment, to be available on appeal, must appear in the record by a statement of facts or a bill of exceptions. *State Bank of Goldendale v. Beeks*..... 42

12. Appeal (272)—Record—Affidavits. Affidavits used in the court below cannot be considered on appeal unless brought up by state-

Appeal and Error—Continued.

ment of facts or bill of exceptions. *Vasicsko v. Kundrak*..... 215

XIII. DISMISSAL.

13. APPEAL (356)—RECORD—DISMISSAL—TIME AND MODE. A motion to dismiss an appeal and affirm the judgment on a short record prepared by respondent will not be granted because the appeal was taken without exceptions taken to the findings of fact and before settlement of a statement of facts or bill of exceptions; since it cannot be known in advance what error the appellant will assign; nor can the supreme court review the merits on such a motion to dismiss. *Kracke v. Cohen*..... 329

XVI. REVIEW.

14. APPEAL (380)—REVIEW—ON APPEALS FROM SPECIFIC ORDERS. An appeal from an order denying a temporary injunction brings up for review the court's refusal to make a finding of insolvency. *State ex rel. Marshall v. Superior Court*..... 631

15. APPEAL (406)—REVIEW—DISCRETION—GRANTING NEW TRIAL. The granting of a new trial where the court had already granted two new trials against the defendant is not of itself sufficient to uphold a charge of abuse of discretion on the part of the trial court. *Moilanen v. Blake Furniture Co*..... 25

16. APPEAL (416)—REVIEW—FINDINGS—EQUITABLE ACTIONS. Findings in an action for an accounting depending upon the credibility of an eye witness whom the trial judge had the advantage of seeing must be considered as based on that which enlightened him on the issues only, and not on incompetent evidence unworthy of belief. *Levy v. Simon*..... 179

17. APPEAL (418)—REVIEW—FINDINGS. Findings by the trial court, upon conflicting evidence, cannot be set aside unless contrary to the preponderance of the evidence. *McDonald v. Curtis*..... 384

18. APPEAL (418)—REVIEW—FINDINGS. Findings on conflicting evidence will be sustained when supported by the preponderance of the evidence. *In re Washington Avenue, Bremerton*..... 643

19. APPEAL (438)—HARMLESS ERROR—PLEADING—DEMURRER. Error in refusing to sustain a demurrer to an affirmative defense is cured by excluding the evidence. *McDonald v. McDonald*..... 396

20. APPEAL (445)—HARMLESS ERROR—ARGUMENT OF COUNSEL. Error cannot be predicated upon an improper remark by counsel in addressing the jury, which was in answer to an equally improper remark of opposing counsel, where the court immediately instructed the jury to disregard it. *Hullin v. Seattle Taxicab Co*..... 311

21. APPEAL (452)—REVIEW—HARMLESS ERROR—ERRORS NOT AFFECTING TRIAL DE NOVO. Error in receiving evidence on an issue not pleaded

Appeal and Error—Continued.

is harmless where the same result is reached by considering the evidence not objected to. *Cohen v. Robinson*..... 392

22. Appeal (465)—Harmless Error—Instructions—Cure by Verdict. Error cannot be predicated upon failure of the instructions to limit the recovery to the amount claimed in the complaint where the verdict was within the sum. *Oliver v. Taylor*..... 190

Appointment:

Of special prosecuting attorney, see District and Prosecuting Attorneys.

Apportionment:

Of water supply for irrigation, see Waters and Water Courses, 6-8.

Appropriation:

Of state funds, see States.

Of water rights in general, see Waters and Water Courses, 1-3.

Approval:

Of plans for school buildings, see Schools and School Districts, 3.

Arbitration and Award:

1. Arbitration and Award (1)—Contracts (39)—Validity—What Law Governs. A written agreement for an arbitration and award, not affecting the title to real property in this state, good as a common law award and valid in the state where made, will be enforced in this state, although it was not made a matter of record nor judgment entered upon it, as required of awards in this state. *Taylor v. Basye*..... 263

Argument of Counsel:

Ground for new trial, see New Trial, 1.

Armory:

Construction of as expenditure for municipal purpose, see Municipal Corporations, 17, 18.

Improvements to armory, see States.

Arrest:

1. Arrest (6)—Without Warrant—Authority. Officers may arrest without warrant for a misdemeanor committed in their presence. *State v. Llewellyn*..... 306

Asportation:

As question for jury, in action on auto theft policy, see Insurance, 3.

Assignments:

Of mortgage as affecting priority of lien, see Mechanics' Liens, 9, 10.

Assignments for Benefit of Creditors:

1. ASSIGNMENT FOR CREDITORS (14, 28)—PENDING ACTIONS—RIGHTS AND REMEDIES OF CREDITORS. Under an assignment for the benefit of creditors, the court assumes complete jurisdiction and the creditors should seek their remedy in that proceeding and not through independent supplementary proceedings in pending actions. *State ex rel. Smith v. Clifford*..... 56

Assumption:

Of risk by employee, see MASTER AND SERVANT, 1, 2, 10.

Attachment:

See GARNISHMENT, 1.

1. ATTACHMENT (39-1) — DISSOLUTION — EFFECT OF AFFIDAVITS. Though the burden of sustaining the grounds of a controverted attachment are upon the party procuring it, an explanation by the defendant of the material allegations of the procuring affidavit for attachment is not sufficient to discharge the writ. *State Bank of Goldendale v. Beeks*..... 42

Attempt:

To commit crime, see CRIMINAL LAW, 10.

Attorney and Client:

See DISTRICT AND PROSECUTING ATTORNEYS.
Argument of counsel as harmless error, see APPEAL AND ERROR, 20.
Attorney's fees in action for separate maintenance, see HUSBAND AND WIFE, 5.
Misconduct of counsel ground for new trial, see NEW TRIAL, 1.
Argument or conduct of counsel at trial in civil actions, see TRIAL, 2.

Authority:

To arrest without warrant, see ARREST.
Of broker, see BROKERS.
Of company to do business, see INSURANCE, 1, 2.
Of agent, see PRINCIPAL AND AGENT, 3, 4.
Of district to erect dwellings for teachers, see SCHOOLS AND SCHOOL DISTRICTS, 1-4.

Automobiles:

Chattel mortgages on, see CHATTEL MORTGAGES.
Motor vehicle insurance, see INSURANCE, 1, 2.
Larceny of, see LARCENY.
Injuries from in city streets, see MUNICIPAL CORPORATIONS, 2-13.
Collision with street car at crossing, see STREET RAILROADS.

Award:

See ARBITRATION AND AWARD.

Of separate maintenance to wife, see HUSBAND AND WIFE, 5.

For injuries, under workmen's compensation act, see MASTER AND SERVANT, 6, 9.

Bail:

1. BAIL (6, 7)—FORFEITURE—DISCHARGE—INSUFFICIENT COMPLAINT. A bail bond given in compliance with Rem. Code, § 1957, conditioned for the principal's appearance in the superior court to answer to the "charge" of rape, is not discharged by reason of the fact that the information was held insufficient on demurrer, where the court permitted the filing of an amended information charging the same offense. *State v. Warden*..... 290

2. SAME (6)—FORFEITURE—NOTICE TO APPEAR. Under Rem. Code, § 2231, judgment of forfeiture of a bail bond may be entered where "due notice was given" the defendant to appear for arraignment on a certain day, and he failed to do so. *State v. Warden*..... 290

Banks and Banking:

Evidence in prosecution for unlawfully loaning funds of bank, see CRIMINAL LAW, 11.

Bank as escrow holder of deed, see ESCROWS.

1. BANKS AND BANKING (4-1)—OFFENSES—UNLAWFUL LOANS—INFORMATION. Under Rem. Comp. Stat., § 3259, making it a felony to loan bank funds to an officer of the bank without procuring authority by a resolution of the directors, an information charging a consummated loan is sufficient, notwithstanding it charges that the resolution was not *first* procured; since a subsequent approval would be no defense. *State v. Larson*..... 123

2. BANKS AND BANKING (4-1)—CRIMINAL LAW (110)—EVIDENCE OF OTHER CRIMES. The offense of loaning the funds of a bank to an officer without procuring the necessary authority involves no element of intent or motive; hence it is error to admit evidence of other like offenses or of a custom to pursue that method. *State v. Larson* 123

3. BANKS AND BANKING (4-1)—CRIMINAL LAW (458)—SENTENCE—EXTENT OF PUNISHMENT. Under Rem. Comp. Stat., § 3259, making it a felony to loan bank funds to an officer of the bank without a resolution of the directors, the court can only sentence defendant to the penitentiary, and not for a misdemeanor. *State v. Larson*..... 123

4. BANKS AND BANKING (4-1)—OFFICERS—CRIMINAL RESPONSIBILITY—UNLAWFUL LOANS. The giving of a note by a bank officer for the purpose of taking up an overdraft which he owed the bank, is not the making of a loan to himself, within Laws 1917, p. 297, § 52 [Rem. Comp. Stat., § 3259], and does not support a charge of the making of a loan on the date the note was given. *State v. Larson*..... 259

Bar:

Of judgment of dismissal as to consolidated actions, see ACTION, 2.
By election of remedy, see ELECTION OF REMEDIES.
Effect of discharge on *habeas corpus*, see HABEAS CORPUS.
Of action by former adjudication, see JUDGMENT, 1-7.
Of action by limitation, see LIMITATION OF ACTIONS.

Bill of Particulars:

In pleading in civil action, see DISCOVERY.

Bills and Notes:

Liability on partnership note to co-partner, see PARTNERSHIP, 1.
Issues and proof in action on note, see PLEADING, 8.

1. BILLS AND NOTES (141)—BONA FIDE PURCHASER—GOOD FAITH—KNOWLEDGE OF DEFECTS—EVIDENCE—SUFFICIENCY. Whether a trade acceptance in consideration of the future delivery of goods was purchased in good faith for value, does not depend so much upon knowledge of circumstances which excite suspicion, as upon the good faith of the purchaser. *Keith v. Chong*..... 507

2. BILLS AND NOTES (142)—ACTIONS—EVIDENCE—SUFFICIENCY—PAYMENT. Findings that a note was not paid will not be disturbed on the conflicting evidence of the two parties, where it appears that the defendant denied making the note, but at the trial admitted the making and extension of time, and that he destroyed it when it was presented, claiming that the only dispute was about interest, while plaintiff's conduct and testimony were consistent throughout and to the effect that defendant had seized and destroyed the note, as charged by the plaintiff at the time in the presence of a police officer. *Bassen v. Andrews*..... 587

Blasting:

Negligence of landlord in blasting on leased premises, see LANDLORD AND TENANT, 3, 4.

Board of Health:

See HEALTH.

Bona Fide Purchaser:

Of bill or promissory note, see BILLS AND NOTES, 1.
Of mortgaged property, see CHATTEL MORTGAGES, 4.
Of lands, see VENDOR AND PURCHASER, 4.

Bonds:

Bail bonds, see BAIL.
Drainage districts, see DRAINS, 2.
Security for garnishment, see GARNISHMENT, 1.

Books:

As evidence, see EVIDENCE, 4.

Boundaries:

Of public lands, see PUBLIC LANDS.

Breach:

Of contract, see CONTRACTS, 5-8.
Damages for breach of contract, see DAMAGES, 1, 4.
Of contract of sale, see SALES.

Brokers:

Parol evidence to vary contract for sale of land, see EVIDENCE, 5.
Agency in general, see PRINCIPAL AND AGENT.

1. BROKERS (4, 19)—CONTRACTS—AUTHORITY—"EXCLUSIVE RIGHT"—NEGOTIATIONS DIRECT WITH PRINCIPAL. A contract giving brokers the "exclusive right to sell" real property for a certain period of time, without negativing the right of the principal to sell the property himself, is not violated by a sale by the principal, during such time, and such a sale does not render the principal liable for commissions where the purchaser was not procured by, or a customer of, the broker. *Sunnyside Land & Investment Co. v. Bernier*..... 386

2. SAME (4, 19). In such a case, a further provision that the owner agrees that he will pay commissions, "in case of sale," or if the broker is instrumental in finding a purchaser, does not negative the right of the owner to make a sale. *Sunnyside Land & Investment Co. v. Bernier*..... 386

Building Contracts:

See CONTRACTS, 2-8.

Buildings:

Affected by mechanics' liens, see MECHANICS' LIENS.
School buildings, see SCHOOLS AND SCHOOL DISTRICTS, 1-5.

Burden of Proof:

On motion to dissolve attachment, see ATTACHMENT.
In trial of civil action, see TRIAL, 1.

Cancellation of Instruments:

Removal of clouds from title, see QUIETING TITLE.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 1-3.

Capital Outlays:

Appropriations for, see STATES.

Carriers:

1. CARRIERS (1)—REGULATION—CERTIFICATES OF PUBLIC NECESSITY—POWERS OF DEPARTMENT. The department of public works cannot grant a certificate of necessity for a stage route to a certain station, without a hearing, where it was already served by a line running past, and within one hundred feet of the station; in view of the express terms of Rem. Comp. Stat., § 6390. *State ex rel. United Auto Transportation Co. v. Department of Public Works*..... 381

2. CARRIERS (3) — REGULATION BY COMMISSION — POWERS — CERTIFICATES OF PUBLIC NECESSITY. The director of public works may grant a certificate of convenience and public necessity to a motor transportation company which was in operation prior to January 15, 1921, and provide therein that it is subject to the ordinances of the city whose streets were part of the route; notwithstanding, Rem. Comp. Stat., § 6390, makes the certificate a matter of right as to companies in operation prior to such date; since such companies are not free from all regulations in view of Id., § 6389, which confers upon the director of public works power and authority to supervise and regulate auto transportation companies. *In re Sound Transit Co.* 684

3. CARRIERS (3)—MUNICIPAL CORPORATIONS (353)—REGULATION BY STATE COMMISSION—POWERS CONFERRED. In view of the title to the auto transportation act, providing for "additional regulation," and section 11 [Rem. Comp. Stat., § 6397] providing that the act shall not repeal any existing act, the act was not intended to repeal existing laws or to deprive a city of the power to regulate the use of its streets, directly delegated by Const., art. 11, § 11, as part of its police powers. *In re Sound Transit Co*..... 684

4. CARRIERS (5)—REGULATION AND CONTROL—DEMURRAGE CHARGES—DELIVERY OF CARS. A railroad company did not make legal delivery of cars, and could not recover demurrage charges where, owing to unprecedented floods, cars of logs consigned to defendant, could not be placed at the usual unloading place or near the plant or unloading spur so that they could be unloaded. *Oregon-Washington Railroad & Navigation Co. v. McGoldrick Lumber Co*..... 119

5. SAME. There was no delivery of cars of logs, to start demurrage charges, where owing to unprecedented floods, the railroad company was unable to move the cars to a position where they could be unloaded, according to the usual custom. *Oregon-Washington Railroad & Navigation Co. v. McGoldrick Lumber Co*..... 119

6. CARRIERS (78-3, 78-6)—STREET RAILWAYS (13, 16)—COLLISIONS WITH VEHICLES—SPEED—NEGLIGENCE. In a passenger's action against the operators of a bus and a city, for injuries sustained in a collision between the bus and a city street car, the negligence of the defendants is for the jury where the evidence on the question of

Carriers—Continued.

excessive speed and failure to give warning signals was conflicting. *Estes v. Babcock* 270

7. CARRIERS (95) — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. The contributory negligence of a passenger in a taxicab, thrown through a glass partition, is not shown by the testimony of the driver that a third person had said plaintiff would not have gone through the glass if he had been sitting properly. *Ramlo v. Five-Hundred Taxicab Co* 379

Certainty:

Of contract, see CONTRACTS, 1.

Certificate:

Of necessity to operate motor stage routes, see CARRIERS, 1-3.

Filing partnership statement as condition precedent to action, see PARTNERSHIP, 3.

Certiorari:

Review of condemnation proceedings, see EMINENT DOMAIN, 5.

1. CERTIORARI (6)—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Certiorari lies to review an order denying a temporary injunction to restrain the destruction of a building by the fire chief, since the remedy by appeal is inadequate because the building would be destroyed before an appeal would be heard. *State ex rel. Marshall v. Superior Court* 631

2. CERTIORARI (14)—CRIMINAL LAW (382)—RIGHT OF STATE TO REVIEW. Under Rem. Code, § 1716, limiting the right of the state to appeal in criminal cases to orders setting aside the information or arresting judgment for insufficiency of the facts or errors of law not affecting an acquittal on the merits, it was the intent to deprive the state of the right to any other review, whether by appeal or certiorari; hence certiorari will not lie to review an interlocutory order suppressing evidence in a criminal case. *State ex rel. Douglas v. Stratiner* 667

3. CERTIORARI (14)—CRIMINAL LAW (382)—RIGHT OF STATE TO REVIEW—INTERLOCUTORY ORDERS. Certiorari does not lie to review an order suppressing evidence obtained through a wrongful search, as the same is an interlocutory ruling amounting to nothing more than a rejection of evidence needed by the state. *State ex rel. Douglas v. Stratiner* 667

Cessation of Controversy:

On appeal, see APPEAL AND ERROR, 3, 4.

Change:

In term of office, see OFFICERS.

Change of Venue:

Of civil actions, see VENUE.

Charge:

Demurrage charge by carrier, see CARRIERS, 4, 5.
To jury in criminal prosecutions, see CRIMINAL LAW, 12, 13, 24, 25.
To jury in civil actions, see TRIAL, 3.

Charges:

Regulation of gas rates, see GAS.

Charities:

1. CHARITIES (1, 2) — VALIDITY — PURPOSES — PUBLIC POLICY. A residuary devise is void as detrimental to public health and against public policy where it provided for the teaching of a system of treatment confined to the doctrine of certain named text books which advanced medical science and the testimony almost conclusively shows would result in sickness and death. *In re Hill's Estate* 62

Chattel Mortgages:

1. CHATTEL MORTGAGES (4)—VALIDITY—STOCK IN TRADE. A chattel mortgage upon a particular automobile held in stock by a dealer is not void as a mortgage upon a shifting stock in trade, as to purchasers charged with constructive notice by record. *Hardin v. State Bank of Seattle* 169

2. CHATTEL MORTGAGES (27)—RECORDING—COUNTY. Where an automobile was sold in K. county to a resident of W. county and it was stipulated that the purchaser should not remove it from W. county, it in effect was delivered in W. county, and that was the proper place to record a chattel mortgage given for the purchase price. *Muller v. Bardshar*..... 252

3. SAME (28)—RECORDING—EFFECT OF REMOVAL. Under Rem. Code, § 3668 [Rem. Comp. Stat., § 3788], providing that mortgaged personal property removed from the county shall be "exempted" from the operation of the chattel mortgage unless the mortgage is recorded within thirty days in the county to which it is removed, applies to mortgaged property in W. county, purchased in I. county within thirty days after its removal to I. county, notwithstanding the purchaser knew the owner lived in W. county and did not investigate the records in W. county where the mortgage was duly recorded. *Muller v. Bardshar*..... 252

4. SAME (43-2) — LIEN — RECORDING — SUBSEQUENT PURCHASERS. In view of Rem. Code, § 3662, making the record of a chattel mortgage constructive notice to the world, a mortgagee of automobiles does not lose his lien by allowing the mortgagor, a dealer, to display the cars on his sales room floor and exhibit them to prospective pur-

Chattel Mortgages—Continued.

chasers; since they, having constructive notice, cannot be regarded as innocent purchasers. *Hardin v. State Bank of Seattle*..... 169

5. CHATTEL MORTGAGES (49) — RIGHTS AND LIABILITIES — USE AND DISPOSITION BY MORTGAGOR. A finding that a chattel mortgagee of automobiles allowed the mortgagor, a dealer, to sell the cars to innocent purchasers without obtaining a satisfaction of the mortgage is not sustained by proof of loose expressions to the effect that he might sell, but could not make delivery until after release of the mortgage. *Hardin v. State Bank of Seattle*..... 169

Cities:

See MUNICIPAL CORPORATIONS.

Civil Service:

Application to municipal agents and employees, see MUNICIPAL CORPORATIONS, 1.

Claim of Right:

Entry and claim of right to sustain adverse possession, see ADVERSE POSSESSION.

Claims:

To property levied on, see EXECUTION.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.
Of lien by materialman, see MECHANICS' LIENS, 3-8.

Classification:

Of injuries under workmen's compensation act, see MASTER AND SERVANT, 6, 9.

Cloud on Title:

See QUIETING TITLE.

Coal Oil:

Judicial notice of tendency to cause explosion, see EVIDENCE, 1.

Collision:

Between taxicab and street car, see CARRIERS, 6.
Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 2-13.
Between street cars or with vehicles, see STREET RAILROADS.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Commingled Funds:

As community property, see HUSBAND AND WIFE, 3.

Commissioners:

Appeals from acts of county board, see APPEAL AND ERROR, 1.

Commissions:

Of broker, see BROKERS.

Community Property:

See HUSBAND AND WIFE, 1-4.

Comparative Negligence:

See MASTER AND SERVANT, 3.

Comparison:

Evidence of similar conditions, see EVIDENCE, 3.

Compensation:

Of broker, see BROKERS.
Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
Under industrial insurance act, see MASTER AND SERVANT, 6-9.

Competency:

Of evidence in civil actions, see EVIDENCE, 2.
Of witnesses in general, see WITNESSES, 1, 2.

Conclusion:

Of witness, see EVIDENCE, 7, 8.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Conditions:

Conditional delivery of deed, see ESCROWS.
Precedent to prosecution for nuisance, see NUISANCE, 1.
Precedent to action, see PARTNERSHIP, 3.
Precedent to rescission of contract for sale of land, see VENDOR AND PURCHASER, 1.

Conduct of Counsel:

As harmless error on appeal, see APPEAL AND ERROR, 20.

Consolidation:

Of actions, see ACTION, 2.

Constitutional Law:

Right of accused to speedy trial, see CRIMINAL LAW, 8.
Limitation on power of municipality to incur indebtedness, see MUNICIPAL CORPORATIONS, 17.
Election of officers, see OFFICERS.

Constitutional Law—Continued.

Validity of dental practice act, see PHYSICIANS AND SURGEONS, 1.
Constitutional restrictions on taxation, see TAXATION, 1-3.
Constitutional prohibition against compelling witness to incriminate himself, see WITNESSES, 3, 4.

1. CONSTITUTIONAL LAW (3)—GENERAL RULES OF CONSTRUCTION. A statute will not be held void unless there can be no reasonable doubt that it offends against the constitution. *Nipges v. Thornton* 464

2. CONSTITUTIONAL LAW (15, 25)—LEGISLATIVE POWERS—DECLARING PUBLIC USE. The declaration of Const., art. 21, that the use of waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use is not exclusive and does not preclude the legislature from declaring other purposes to be public uses. *State ex rel. Andersen v. Superior Court*..... 406

3. CONSTITUTIONAL LAW (26)—EMINENT DOMAIN (11)—LEGISLATIVE POWERS—ENCROACHMENT ON JUDICIARY—DECLARING PUBLIC USE. The provision in Const., art. 1, § 16, that in the condemnation of private property, whether the contemplated use be really public shall be a judicial question, does not preclude the legislature from declaring in the first instance that a purpose is a public one. *State ex rel. Andersen v. Superior Court*..... 406

4. CONSTITUTIONAL LAW (40)—DISTRIBUTION OF POWERS—ENCROACHMENT ON EXECUTIVE—PARDONS AND PAROLES. Rem. Comp. Stat., § 2280, authorizing the court to suspend a sentence, is not violative of Const., art. 3, § 9, vesting the pardoning power in the governor; and the statute does not authorize a pardon, but only to suspend, "until otherwise ordered by such court." *State ex rel. Tingstad v. Starwich* 561

Construction:

Of statutes, see CONSTITUTIONAL LAW, 1; STATUTES, 2.
Of contracts, see CONTRACTS, 2-4.

Contempt:

Failure or refusal to deliver property to receiver, see RECEIVERS.

Contest:

Payment of inheritance tax, see TAXATION, 4, 5.

Contracts:

Nature of action as distinguished from action on tort, see ACTION, 1.
Agreement to arbitrate, see ARBITRATION AND AWARD.
Compensation of broker, see BROKERS.
For services, sufficiency of complaint, see COUNTIES.
Damages for breach, see DAMAGES, 1, 4.

Contracts—Continued.

Admission of parol or extrinsic evidence, see EVIDENCE, 5.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Sale and removal of timber, see LOGS AND LOGGING.
Limitation of action on implied contracts, see LIMITATION OF ACTIONS, 1.
To sustain mechanic's lien, see MECHANICS' LIENS, 1, 2, 7, 10.
Amendment to sustain recovery on *quantum meruit*, see PLEADING, 4.
Ratification of acts of agents, see PRINCIPAL AND AGENT, 2.
Sales of personalty, see SALES.
Agreement for severance of co-tenancy, see TENANCY IN COMMON, 1.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS (3)—CERTAINTY—TIME AND PLACE. An agreement whereby the logging engine was to be returned to the sellers for their use during the following summer for the purpose of completing the logging of a certain forty acres is sufficiently definite as to the period of time covered. *Olson v. Solberg*..... 496

2. CONTRACTS (86)—CONSTRUCTION—BUILDING CONTRACT. Proposals by a sash and door factory to furnish all window frames for a building do not include the priming coat, which the specifications required should be given before placing, where the proposals did not refer to the specifications or mention the painting. *Dalk v. Black* 368

3. CONTRACTS (86)—CONSTRUCTION—BUILDING CONTRACTS. A proposal by a sash and door factory to furnish all mill work for a building, specifying the list of materials, consisting of doors, window sash frames, and so forth, including "all glass," refers to the glass in the frames and sashes listed, and does not include skylight glass to be set in metallic frames not included in the proposals, or made by the factory. *Dalk v. Black* 368

4. CONTRACTS (92)—PERFORMANCE—REASONABLE TIME. Where no time is stipulated for the furnishing of mill work for a building, it must be furnished within a reasonable time. *Dalk v. Black*.. 368

5. CONTRACTS (148, 161)—PERFORMANCE OR BREACH—EXCUSE FOR DELAY—EVIDENCE—ADMISSIBILITY. Where a county answered to a contractor's complaint that he had abandoned the contract after failing to complete the work on time, and there was evidence tending to show waiver of the time limit, evidence that the delay was caused by high water and inability to obtain cement is admissible as tending to disprove abandonment. *Davis v. Thurston County* 414

6. CONTRACTS (151)—PERFORMANCE—DELAY—WAIVER. Findings upon the conflicting statements of the parties to a building contract that a delay was waived on account of a strike, are supported where plaintiff's evidence was corroborated by one of defendant's witnesses and by the fact that defendant expressed sympathy with the strike. *Great Northern Construction Co. v. Gulstine*..... 640

Contracts—Continued.

7. CONTRACTS (151, 162)—PERFORMANCE OR BREACH—WAIVER OF OBJECTIONS—EVIDENCE—QUESTION FOR JURY. The liability of a county upon a bridge contract, after preventing the contractor from completing the work after the time limit had expired, is for the jury where there was evidence of waiver of the time limit and that the contractor was able and willing to perform, and had not abandoned the work. *Davis v. Thurston County* 414

8. SAME (159)—RIGHTS ON PARTIAL PERFORMANCE. Where the parties to a building contract agreed that another contractor should remedy defects in placing the windows, at the expense of the contractor, the amount paid therefor fixes the limits of the contractor's liability for his failure of performance. *Great Northern Construction Co. v. Gulstine* 640

Contributory Negligence:

Of injured passenger, see CARRIERS, 7.
Of servant, see MASTER AND SERVANT, 2-5.
Of driver of auto in city street, see MUNICIPAL CORPORATIONS, 3-5, 14.
Of person damaged by breaking of water main, see MUNICIPAL CORPORATIONS, 15.
Of driver of vehicle, see STREET RAILROADS, 1, 2, 4.

Conveyances:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Of personalty as security for debt, see CHATTEL MORTGAGES.
In general, see DEEDS.
In escrow, see ESCROWS.
As security for debt, see MORTGAGES.
Mortgaged property, see MORTGAGES, 2, 3.

Corporations:

See MUNICIPAL CORPORATIONS.
Insurance companies, see INSURANCE, 1, 2.
Receivers of, see RECEIVERS.

1. CORPORATIONS (82) — STOCKHOLDERS' MEETINGS — WHAT CONSTITUTES. A conference between members of a family holding all the stock in a corporation, for the purpose of determining business policies, will not be held to be a stockholders' meeting, where it was not so intended and no corporate record was made of what transpired. *Barnett v. Mayer & Brothers* 323

2. SAME (121)—AGENTS—REMOVAL. An employee of a corporation is not discharged by a vote of the stockholders, authorizing a certain officer to discharge him, where such officer refused to do so, for reasons apparently justifying such course; nor would he be discharged by notice from another officer not authorized by affirmative action of the corporation so to do, no such affirmative action being

Corporations—Continued.

possible because the hostile factions held an equal interest and control in the company. *Barnett v. Mayer & Brothers* 323

3. CORPORATIONS (262, 263) — ACTIONS — VENUE — PROCESS — AGENT. Non-resident surety companies may be sued in a county wherein they had a resident agent and office for the transaction of business, and where the bond in suit was negotiated, even though signed elsewhere. *State ex rel. Nichols v. Superior Court* 218

Corroboration:

Of prosecutrix in prosecution for rape, see RAPE.

Costs:

1. COSTS (80)—ON APPEAL—UNNECESSARY MATTER—IMPROPER ABSTRACT. Where the transcript consisted of but 166 pages, costs will not be allowed for an abstract of over 100 pages made up almost exclusively of question and answer, as the same is not a substantial compliance with the rule. *Great Northern Construction Co. v. Gulstine* 640

Cotenancy:

See TENANCY IN COMMON.

Counties:

Appealability of orders of county board, see APPEAL AND ERROR, 1.
Place of recording mortgage, see CHATTEL MORTGAGES, 2.
County attorneys, see DISTRICT AND PROSECUTING ATTORNEYS.
Establishment of drains, see DRAINS.
Duty to maintain highways, see HIGHWAYS, 1.
Mandamus to compel issuance of warrant, see MANDAMUS.
Matters relating to school districts, see SCHOOLS AND SCHOOL DISTRICTS.
Poll tax as levy on county, see TAXATION, 2.

1. COUNTIES (100)—ACTIONS—PLEADING—CONTRACTS. In an action against a county upon a written contract made by the sheriff and prosecuting attorney for services in the enforcement of the liquor law, under Rem. Comp. Stat., § 4940, setting aside for that purpose fifty per cent of all fines collected for liquor violations, the complaint states a cause of action against the county where it alleges that the contract was made with the consent and approval and by the authority of the county commissioners. *Revelare International Secret Service v. Whatcom County* 646

Courts:

Review of decisions, see APPEAL AND ERROR.
Jurisdiction of proceedings, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Construction of statutes, see CONSTITUTIONAL LAW, 1.

Courts—Continued.

Legislative declaration of public use in condemnation of property as encroachment on judiciary, see CONSTITUTIONAL LAW, 3.
Review in criminal cases, see CRIMINAL LAW, 20-25.
Appointment of special prosecuting attorneys, see DISTRICT AND PROSECUTING ATTORNEYS.
Condemnation proceedings, see EMINENT DOMAIN.
Judicial notice, see EVIDENCE, 1.
Conclusiveness of judgments, see JUDGMENT, 1-7.
Right to trial by jury, see JURY.
Review of orders of industrial insurance department, see MASTER AND SERVANT, 6, 7, 9.
Review of action removing civil service employee, see MUNICIPAL CORPORATIONS, 1.

1. COURTS (38)—RULE OF DECISION—FEDERAL DISTRICT COURTS. The supreme court of this state is not bound by the decisions of any Federal court except the supreme court of the United States. *Noble v. Dibble* 509

Covenants:

For repair of leased premises, see LANDLORD AND TENANT, 5.

Credibility:

Of witness, see WITNESSES, 5-8.

Creditors:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Criminal Law:

See EMBEZZLEMENT; HOMICIDE; LARCENY; NUISANCE; RAPE.
Arrest of accused, see ARREST.
Bail, see BAIL.
Offenses by bank officers, see BANKS AND BANKING.
Right of state to review of orders by certiorari, see CERTIORARI, 2, 3.
Act authorizing court to suspend sentence as encroachment on executive power to pardon or parole, see CONSTITUTIONAL LAW, 4.
Prosecuting officers, see DISTRICT AND PROSECUTING ATTORNEYS.
Discharge on *habeas corpus* as bar to prosecution, see HABEAS CORPUS.
Information or criminal complaint, see INDICTMENT AND INFORMATION.
Preliminary examination as prerequisite to information, see INDICTMENT AND INFORMATION, 1.
Violation of liquor laws, see INTOXICATING LIQUORS.
Trial of civil actions, see TRIAL.
Cross-examination of accused, see WITNESSES, 3-5.

1. CRIMINAL LAW (84)—EVIDENCE—FACTS IN ISSUE—RELEVANCY. In a prosecution for robbery, upon a question as to whether accused had time to drive his accomplices to the scene of the crime by a

Criminal Law—Continued.

certain route and wait for them a short distance away, it is proper to admit evidence of the time taken to drive another automobile over the same route. *State v. Simpson* 653

2. CRIMINAL LAW (104)—EVIDENCE—RES GESTAE—STATEMENTS OF PERSON INJURED. Upon a prosecution for murder by blowing up a dredge, statements of an injured workman made within 10 or 15 minutes after the explosion, when rescued from the water, are admissible as part of the *res gestae*, where they were spontaneously made and presumptively impulsive and without design or premeditation. *State v. Goodwin* 135

3. SAME (104). In such a case, statements made while the injured man was being rowed across the river, and which were mere repetitions of his first statements, are admissible as part of the *res gestae*. *State v. Goodwin* 135

4. SAME (131-1)—EVIDENCE—ADMISSIONS OF ACCUSED—ACQUIESCENCE OR SILENCE. In a prosecution for murder by blowing up a dredge, statements of deceased shortly after the explosion charging defendant with the crime, made in defendant's presence, and not replied to when the circumstances naturally called for a reply, are admissible. *State v. Goodwin* 135

5. CRIMINAL LAW (137) — EVIDENCE — HEARSAY — DECLARATIONS OF THIRD PERSONS. In a prosecution for criminal syndicalism, on an issue as to the unlawful purposes of membership in the I. W. W., testimony as to what supposed members of the organization stated and told the witnesses were the purposes of the organization is inadmissible as hearsay. *State v. Cantwell* 665

6. CRIMINAL LAW (144)—PRIVATE WRITINGS—DAILY REPORT SLIPS. In a prosecution for embezzlement, a daily report slip which it was the duty of accused to make, is admissible although it was not a complete record of the day's business. *State v. Tibbits* 611

7. CRIMINAL LAW (145)—EVIDENCE—MAPS. In a prosecution for robbery, it is not error to exclude a map or sketch, where it was immaterial and other testimony identified the only thing upon it. *State v. Simpson* 653

8. CRIMINAL LAW (188)—TIME FOR TRIAL—DISCHARGE FOR DELAY—WAIVER. Upon the state's appeal from an order sustaining a demurrer to an information with leave to amend, the accused waives the statute requiring that he be brought to trial within sixty days, and cannot complain of a denial of a speedy trial guaranteed by Const., art. 1, § 21, where he failed to apply for trial within sixty days, but only demanded his discharge. *State ex rel. Anderson v. Callahan* 535

9. CRIMINAL LAW (226)—INDICTMENT AND INFORMATION (95)—ELECTION BETWEEN ACTS—ISSUES, PROOF AND VARIANCE—TIME OF OF-

Criminal Law—Continued.

FENSE. In a prosecution for statutory rape by sexual intercourse on four alleged occasions, in which the defense is an alibi on the date relied upon, the state's election makes the date material, notwithstanding Rem. Code, §2060, providing that it is not essential to prove an offense on the exact date charged. *State v. Hart*..... 529

10. CRIMINAL LAW (226)—ELECTION BETWEEN ACTS. In such a case, defendant's admission of an attempt to commit the offense, without fixing the time and place, does not warrant the submission of an instruction on the offense of attempting to rape, when there was no evidence of any act on the day charged. *State v. Hart* 529

11. CRIMINAL LAW (229)—TRIAL—SCOPE OF EVIDENCE IN REBUTTAL. In a prosecution for unlawfully loaning the funds of a bank, evidence of other like offenses is not admissible in rebuttal, because of defendant's statements on cross-examination as to defendant's request to another officer to have the loan attended to in the regular way. *State v. Larson* 123

12. SAME (296)—TRIAL—INSTRUCTIONS AS TO ACCOMPLICES. An instruction as to the responsibility of an accomplice who drove his associates to and from the scene of a robbery is favorable to the accused where it was to the effect that association with the others in the robbery would make him an accomplice, but that he would not be guilty unless he aided, counselled or assisted in its commission. *State v. Simpson* 653

13. SAME (316)—TRIAL—INSTRUCTIONS. It is not error to refuse to give instructions in the language requested, if covered by instructions given. *State v. Simpson*..... 653

14. CRIMINAL LAW (347)—NEW TRIAL—PREJUDICE OF JUROR. It is not an abuse of discretion to refuse a new trial on account of the prejudice of one juror, where the motion was supported by hearsay affidavit for appellant's attorney and denied by the hearsay affidavit of the prosecuting attorney. *State v. Dudman* 522

15. CRIMINAL LAW (350)—NEW TRIAL—COMMUNICATION BY OR WITH JURORS. Misconduct of the bailiff in sending a communication to a member of the jury while deliberating on its verdict, contrary to Rem. Code, § 349, will not require a new trial where it appears that the communication was a nonprejudicial note from the juror's wife. *State v. Carroll* 623

16. CRIMINAL LAW (353)—NEW TRIAL—SURPRISE. A claim of surprise, to authorize a new trial, must be made at the time it occurs, or it is waived. *State v. Tibbits* 611

17. CRIMINAL LAW (370)—SUSPENSION OF SENTENCE. Under Rem. Comp. Stat, § 2280, to suspend a sentence, if a prisoner is sentenced to a term in the county jail, he must be put in charge of some parole

Criminal Law—Continued.

or peace officer not necessarily connected with that institution; and if sentenced to a state penal institution, he must be put in charge of a parole officer of such institution. *State ex rel. Tingstad v. Starwich* 561

18. SAME (370). Where a sentence is suspended and the prisoner released on parole, the court does not lose jurisdiction to enforce the judgment by lapse of the time which the sentence covered. *State ex rel. Tingstad v. Starwich* 561

19. CRIMINAL LAW (370)—SUSPENSION OF SENTENCE—POWER TO ENFORCE. Where a sentence has been suspended under Rem. Comp. Stat., § 2280, the fact that the prisoner was not placed in charge of some parole or peace officer, as required by law, does not deprive the court of jurisdiction to enforce the judgment upon the breaking of the parole. *State ex rel. Tingstad v. Starwich* 561

20. CRIMINAL LAW (382)—APPEAL—RIGHT OF STATE TO APPEAL. Under Rem. Code, § 1716, authorizing appeals from a final judgment and providing that no appeal shall be allowed the state in any criminal action except for error in setting aside the indictment or information, or in arresting judgment on the ground that the facts do not state a crime, no appeal lies from an order sustaining a demurrer to the information, where no judgment of dismissal was entered; and the fact that the state refused to amend or further plead does not convert the order into a final judgment of dismissal. *State v. Anderson* 280

21. CRIMINAL LAW (399)—INDICTMENT AND INFORMATION (87)—DEMURRER—OPERATION AND EFFECT OF ORDER SUSTAINING—APPEAL—SUPERSEDEAS. Upon the state's appeal from an order sustaining (with leave to amend) a demurrer to an information for first degree murder, a non-bailable offense, the accused is not entitled to a discharge, where the information did not contain matter constituting a defense or bar; as the case comes within Rem. Code, § 2103, providing that if a case be resubmitted, the defendant, if in custody, must remain so, unless bailed; in view of § 2106, providing that the order is final only if the information contains matter which is a legal defense or bar, and § 2313, providing for a discharge only in case the case is dismissed, and of §§ 1075 and 1076 prohibiting a discharge from a judicial commitment if the term has not expired, or for any defect or want of probable cause, except upon investigation upon which the prisoner may be recommitted or admitted to bail. *State ex rel. Anderson v. Callahan* 535

22. SAME (441)—APPEAL—REVIEW—QUESTIONS OF FACT. A conviction supported by evidence will not be set aside for insufficient evidence, especially where it was largely a question of the credibility of witnesses and the jury went over, and viewed, the scene of the crime. *State v. Simpson* 653

Criminal Law—Continued.

23. SAME (450, 451)—APPEAL—HARMLESS ERROR—EXAMINATION OF WITNESS. Prejudicial error cannot be predicated upon offering the wife of the accused as a witness, and stating that it had something to do with a revolver and not to any communication with accused, where the jury were excused during argument thereon, and the evidence was excluded. *State v. Simpson* 653

24. CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—REQUESTS. It is not error to refuse to give requested instructions in the language proposed, where they were covered in other instructions as favorable to the accused. *State v. Colagino* 301

25. SAME (452). An instruction upon the subject of the flight of the accused is not prejudicial where, as a whole, the meaning was clear, and the jury were left to say whether the evidence justified the conclusion that accused had fled or attempted flight. *State v. Colagino* 301

Criminal Syndicalism:

Evidence in prosecution for, see CRIMINAL LAW, 5.

Crops:

Rights to as between purchaser and tenant, see VENDOR AND PURCHASER, 4.

Cross-Examination:

See WITNESSES, 3-5, 7, 8.
Of expert witness as to reasons for conclusion, see EVIDENCE, 8.

Crossings:

Accidents at street crossings, see MUNICIPAL CORPORATIONS, 2-10.
Accident at street railroad crossings, see STREET RAILROADS.

Cruelty:

Ground for divorce, see DIVORCE, 2.

Customs and Usages:

1. CUSTOM AND USAGES (6)—EVIDENCE AS TO EXISTENCE OF CUSTOM. The evidence of one witness that it was the custom of the plant with which he was familiar to put a priming coat on window frames and sash does not establish a general custom among mill work manufacturers to do so. *Dalk v. Black*..... 368

Damages:

For breach of contract, see CONTRACTS, 8.
Liability of landlord for disturbing possession of tenant, see LANDLORD AND TENANT, 3, 4.
For injuries based on comparative negligence statute, see MASTER AND SERVANT, 3.

Damages—Continued.

Ground for new trial, see New Trial, 3.
Amendment to conform to proof of, see Pleading, 5.
For breach of implied warranty, see Sales, 3, 4.

1. Damages (74, 128)—Measure of Damages—Breach of Contract—Instructions. Where a contract for the construction of a bridge is breached through no fault of the contractor before completion of the work, the measure of damages, where the contractor does not ask for profits lost, is such proportion of the whole contract price as the amount of work done bears to the whole amount of the work to be done; and it is error to instruct the jury that he would be entitled to reimbursement for his expenses in so far as he proceeded in the performance of the contract and in addition all profits which he would have realized by performing the whole contract. *Davis v. Thurston County*..... 414

2. Damages (80)—Personal Injuries—Excessive Verdict. A verdict for $10,000 for personal injuries is not to be deemed excessive, where, although not necessarily permanent, there was testimony that it might take years for recovery, and it appeared that some ten months after the accident the injured party was required to undergo an operation for the purpose of stopping hemorrhages and there was uncertainty as to the results of the operation at the time of trial. *McClung v. King County*..... 14

3. Damages (80)—Excessive Damages—Injury to Person. A verdict for $4,000 for personal injuries sustained in an automobile collision is not excessive, where plaintiff was severely bruised, bones were broken, her vision permanently impaired, she was long in a hospital and will require medical attention for the rest of her life. *Oliver v. Taylor*..... 190

4. Damages (118)—Measure—Breach of Contract—Preventing Performance—Loss of Profits. Plaintiff's damages for breach of contract for the use of a logging engine are sufficiently shown by proof of the value of logs lost by inability to obtain any other engine to complete his logging contract within its time limit. *Olson v. Solberg*..... 496

5. Damages (124)—Trial (93)—Instructions—Applicability—Mental Anguish. In an action for personal injuries, it is error to give an instruction allowing damages for mental anguish where there was no evidence that plaintiff suffered mental anguish other than the pain and incapacity naturally incident to the injuries complained of. *Estes v. Babcock*..... 270

Death:

Admissibility of declarations of persons since deceased, see Evidence, 6.

Debt:

Authority of agent to collect debts, see PRINCIPAL AND AGENT, 3, 4.

Debtor and Creditor:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Decedents:

Testimony as to transactions with person since deceased, see EVIDENCE, 4; WITNESSES, 1, 2.
Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

Review on appeal, see APPEAL AND ERROR, 1, 2.
Of Federal courts as affecting state supreme court, see COURTS.
Of industrial insurance department, see MASTER AND SERVANT, 6, 7, 9.

Declarations:

As evidence in criminal prosecutions, see CRIMINAL LAW, 2, 3, 5.
As evidence in civil actions, see EVIDENCE, 4-6.

Deeds:

In escrow, see ESCROWS.
Absolute deed as mortgage, see MORTGAGES, 1.

1. DEEDS (19-1)—PRINCIPAL AND AGENT (63)—ACCEPTANCE OF BENEFITS—DELIVERY—RATIFICATION. Where a bank, acting as vendors' agent, delivered a deed on payment of the price, without securing execution of a contract allowing vendors to remove a crop, contrary to its instructions, vendors' acceptance of the price with knowledge of the facts ratifies the delivery of the deed. *Miller v. Smith*... 163

Defect:

In highway, see HIGHWAYS.
In city water pipes, see MUNICIPAL CORPORATIONS, 15, 16.
In goods sold, see SALES, 3, 4.
In title of vendor, see VENDOR AND PURCHASER, 1, 2.

Delay:

In performing contract, see CONTRACTS, 5, 6.
In furnishing bill of particulars, see DISCOVERY.

Delivery:

Of goods by carrier, see CARRIERS, 4, 5.
Of deed, see DEEDS; ESCROWS.
Of property by judgment debtor, see EXECUTION.

Demurrage:

Delivery as affecting right to make charge, see CARRIERS, 4, 5.

Demurrer:

Appeal from order sustaining demurrer to information, see CRIMINAL LAW, 20, 21.

To information, effect of order sustaining, see INDICTMENT AND INFORMATION, 3.

To answer good in part, see PLEADING, 3.

Denials:

In pleading, see PLEADING, 1, 8, 9.

Dentists:

Validity of dental practice act, see PHYSICIANS AND SURGEONS, 1.

Department of Public Works:

Regulation of carriers, see CARRIERS, 1-3.

Establishment of gas rates, see GAS.

Departure:

In pleading, see PLEADING, 2.

Descent and Distribution:

Inheritance and transfer taxes, see TAXATION, 4, 5.

Description:

In contract for lands, see FRAUDS, STATUTE OF, 2.

Devise:

Charitable devise, see CHARITIES.

Diligence:

Affecting right to new trial, see CRIMINAL LAW, 16.

Discharge:

Of bail bond for insufficient complaint, see BAIL, 1.

Of corporate employee, see CORPORATIONS, 2.

Of accused through delay in trial, see CRIMINAL LAW, 8.

Right of accused after order sustaining demurrer to information, see CRIMINAL LAW, 21; INDICTMENT AND INFORMATION, 3.

On habeas corpus, see HABEAS CORPUS.

Discovery:

1. DISCOVERY (10)—PLEADING (134-1)—BILL OF PARTICULARS—DISCRETION OF COURT—EXCUSE FOR DELAY. A reasonable excuse for delay in furnishing a bill of particulars and answering interrogatories, where no prejudice resulted and the failure was not willful, war-

Discovery—Continued.

rants the court in exercising its discretion and should not preclude the party from giving evidence as to the matters. *McDonald v. McDonald* 396

Discretion:

Appeals from acts of county board, see APPEAL AND ERROR, 1.

Discretion of Court:

Review in civil actions, see APPEAL AND ERROR, 15.
On showing excuse for delay in furnishing bill of particulars, see DISCOVERY.
New trial, see NEW TRIAL, 1, 3, 4.

Dismissal and Nonsuit:

Dismissal as bar of consolidated actions, see ACTION, 2.
Dismissal on appeal, see APPEAL AND ERROR, 13.
Judgment of dismissal as res adjudicata, see JUDGMENT, 1, 3.
Effect of dismissal of action under jurisdiction of industrial insurance department, see MASTER AND SERVANT, 7.

District and Prosecuting Attorneys:

1. DISTRICT AND PROSECUTING ATTORNEYS (3)—SPECIAL PROSECUTORS—APPOINTMENT—STATUTORY PROVISIONS. Rem. Comp. Stat., § 4135, and Laws 1891, p. 95, § 5, both expressly authorize the court or judge to appoint a special prosecuting attorney where the prosecuting attorney is unable to perform his duties; and this, without any recital or reference as to how he will be compensated. *State v. Wallace* 457
2. SAME (3). Rem. Comp. Stat., § 4135, authorizing the appointment of any qualified person in the state as special prosecuting attorney, where no qualified person in the county will consent to act, authorizes the appointment of an attorney from another county, when the order recites that, upon request, local attorneys selected by the court had refused to act. *State v. Wallace*..... 457

Districts:

See SCHOOLS AND SCHOOL DISTRICTS.
Drainage districts, see DRAINS.

Dissolution:

Of attachment, see ATTACHMENT.

Ditches:

See DRAINS.

Diversion:

Of waters apportioned for irrigation, see WATERS AND WATER COURSES, 6.

Divorce:

Separate maintenance, see HUSBAND AND WIFE, 5.

Liability of divorced husband for support of child placed in private asylum by mother, see INSANE PERSONS.

1. DIVORCE (8)—HUSBAND AND WIFE (106)—GROUNDS—INABILITY TO LIVE TOGETHER—SEPARATE MAINTENANCE. A divorce should not be granted on account of inability to live together, where the husband was at fault under flagrant circumstances making it against public policy, but the wife's plea for separate maintenance should be granted. *Morden v. Morden* 176

2. DIVORCE (36)—EVIDENCE—CRUELTY—SUFFICIENCY OF FINDINGS. A finding that each of the parties have used abusive language to each other and in times of extreme temper used physical force against each other, sustains a decree of divorce on the ground of cruelty. *Andersen v. Andersen* 71

Doctors:

See PHYSICIANS AND SURGEONS.

Documents:

As evidence in criminal prosecutions, see CRIMINAL LAW, 6.

Domicile:

Of parties as affecting venue, see VENUE.

Draft:

Proceeds of as property subject to garnishment, see GARNISHMENT, 2.

Drains:

Appeals from acts of county board relating to, see APPEAL AND ERROR, 1.

1. DRAINS (4)—ESTABLISHMENT BY COUNTIES—WITHIN CITIES. The legislature had the power by Laws 1921, p. 646, § 1 [Rem. Comp. Stat., § 4405] to establish a drainage district "whether wholly or partly within the limits of any incorporated city." *Weatherwax v. Grays Harbor County* 68

2. DRAINS (9)—PROCEEDINGS FOR ESTABLISHMENT—BONDS. Failure of petitioners for the establishment of a drainage district to give the bond required by the county commissioners does not defeat the jurisdiction of the board to order the district established. *In re Drainage District No. 10, King County* 8

Duplicity:

In information, see INDICTMENT AND INFORMATION, 2.

Duration:

Of judgment lien, see JUDGMENT, 8.

Dwelling:

For school teachers, see SCHOOLS AND SCHOOL DISTRICTS, 1-4.

Earnings:

Of business as separate property, see HUSBAND AND WIFE, 3.

Ejectment:

1. EJECTMENT (6)—TITLE TO SUPPORT ACTION. In ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's. *Harper v. Holston*..... 436

Election:

Between acts by prosecution, see CRIMINAL LAW, 9, 10.

Election of Remedies:

1. ELECTION OF REMEDIES (5)—VALIDITY AND FINALITY—INEFFECTIVENESS OF REMEDY. The filing of a claim for compensation under the workmen's compensation act cannot be said to be an election of remedies, precluding a telephone operator, struck by a city street car while crossing the track, from suing the city for his injuries, where there was no showing that he had received or was entitled to compensation, or that the telephone company was subject to the act. *Plastino v. Seattle*..... 195

Elections:

Submission of question of municipal expenditures in general, see MUNICIPAL CORPORATIONS, 19.

Laws relating to elections and term of office, see OFFICERS.

Submission to popular vote of question of school buildings, see SCHOOLS AND SCHOOL DISTRICTS, 5.

Embezzlement:

Evidence in prosecution for, see CRIMINAL LAW, 6.

Sufficiency of information, see INDICTMENT AND INFORMATION, 2.

1. EMBEZZLEMENT (3)—ELEMENTS OF OFFENSE—BY AGENTS. Where an agent was intrusted with a certificate of stock for sale in July, and on the following January sold it and refused to account for the proceeds he is guilty of larceny, under subdiv. 3, of Rem. Code, § 2601, making it larceny for an agent or bailee, intrusted with the possession of property, to appropriate the same to his own use. *State v. Dudman*..... 522

2. EMBEZZLEMENT (5)—DEFENSES—REPARATION. In a prosecution for larceny by embezzlement by an agent of insurance companies, an offer of reparation by return of the money stolen is no defense,

Embezzlement—Continued.

there being no question of defendant's good faith in his dealings. *State v. Shears* 275

3. EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution of an insurance agent for embezzlement, evidence of transactions on behalf of two companies is admissible where it was alleged that he was agent of the two companies, doing business under the name of Philadelphia Underwriters. *State v. Shears* 275

4. EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution for the embezzlement of a certificate for one thousand shares of stock, intrusted by A. to the defendant as agent for sale, in which defendant admitted the sale of one thousand shares to W. claiming it was not A.'s stock but part of his own, entries in the corporate stock books are admissible showing the cancellation of A.'s certificate at the time in question, and the reissue, in lieu thereof, of a certificate to W. for one thousand shares; in view of Rem. Comp. Stat., §§ 3693, 3827 requiring a corporate record of all certificates showing date, number and to whom issued and transferred, and Id., § 3829, making it a misdemeanor to make any false entry in such record. *State v. Dudman* 522

5. EMBEZZLEMENT (18)—EVIDENCE—SUFFICIENCY. Embezzlement by appropriating money collected by an employee, is a question for the jury where the amount taken was paid by check drawn in the employer's name, endorsed and received by accused, but not reported on the daily slips, and accused claimed to have accounted for the proceeds in another book which the employer testified did not exist. *State v. Tibbits* 611

Eminent Domain:

Legislative declaration of public use as encroachment on judiciary, see CONSTITUTIONAL LAW, 3.

1. EMINENT DOMAIN (13, 20)—PARTICULAR USE—WATER SUPPLY—DOMESTIC PURPOSES. Where the use of water for domestic purposes is the foundation of an agricultural enterprise, and absolutely necessary to carry on a large farm in the semi-arid section, it is a public use and within Rem. Comp. Stat., § 7354, authorizing the condemnation of water for any "beneficial use." *State ex rel. Andersen v. Superior Court* 406

2. SAME (13, 20)—SUPERIOR NECESSITY. Where the owner has never made any use of small springs, a use for domestic purposes necessary to run a large farm is superior to the owner's use to irrigate an area of less than one acre. *State ex rel. Andersen v. Superior Court* 406

3. SAME (13, 20). The use of waters not subject to appropriation may nevertheless be condemned for a public use. *State ex rel. Andersen v. Superior Court* 406

Eminent Domain—Continued.

4. EMINENT DOMAIN (15, 39)—PRIVATE WAY OF NECESSITY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain an order adjudging a private way of necessity, where it is shown that there is no practical or feasible route out other than the one proposed. *State ex rel. Schleif v. Superior Court* 372

5. EMINENT DOMAIN (158)—PROCEEDINGS—REVIEW ON CERTIORARI—STATEMENT OF GROUNDS—SUFFICIENCY. Under Rem. Code, § 1002, providing that the writ of certiorari shall be granted to correct an erroneous proceeding, or proceeding not according to the course of the common law, when there is no appeal, an adjudication of use and necessity in a condemnation proceeding is reviewable under such a writ where the petition therefor alleges that it is contrary to the evidence and the law, that the property sought to be appropriated is not properly described in the petition for condemnation and is not necessary for the improvement, that the finding that the improvement would provide a good and sufficient outlet is contrary to the evidence, and that the orders overruling the motion to strike and make more definite and overruling a demurrer are contrary to law. *State ex rel. Abbott v. Superior Court* 26

Employees:

See MASTER AND SERVANT.
Removal of, see CORPORATIONS, 2.
Under civil service rules, see MUNICIPAL CORPORATIONS, 1.

Entry:

To sustain adverse possession, see ADVERSE POSSESSION.

Equity:

See INJUNCTION.
Review of findings in equity, see APPEAL AND ERROR, 16.
Right to jury trial in equitable action, see JURY.
Determination of adverse claims to real property, see QUIETING TITLE.

Escrows:

1. ESCROWS (1)—NATURE AND REQUISITES. A bank holding a deed as agent of the vendors for delivery and collection of the price is not an escrow holder, so as to invalidate a delivery made contrary to instructions, without performance of a condition precedent. *Miller v. Smith* 163

Establishment:

Of drains, see DRAINS.
Of gas rates, see GAS.

Estates:

Of deceased persons, see Executors and Administrators.
Tenancy in common, see Tenancy in Common.

Estimates:

Of necessary levy for school tax, see Schools and School Districts, 6.

Estoppel:

Right to raise question for first time on appeal, see Appeal and Error, 5-10.
By election of remedy, see Election of Remedies.
By judgment, see Judgment, 1-7.
Between principal and agent, see Principal and Agent, 2.
Between cotenants, see Tenancy in Common, 2.
To rescind contract for sale of land, see Vendor and Purchaser, 3.

Evidence:

Hostile character of possession, see Adverse Possession.
Review of rulings as dependent on presentation by record, see Appeal and Error, 11, 12.
Harmless error on appeal, see Appeal and Error, 21.
To vacate attachment, see Attachment.
In prosecution for unlawful loan to officer, see Banks and Banking, 2.
On bill or note, see Bills and Notes, 1.
For injuries to passenger, see Carriers, 7.
Review of interlocutory orders by state in criminal case, see Certiorari, 2, 3.
For breach of contract, see Contracts, 5-7.
In criminal prosecutions, see Criminal Law, 1-7, 11.
Customs or usage, see Customs and Usages.
Discovery of evidence, see Discovery.
Of cruelty, for divorce, see Divorce, 2.
In prosecution for embezzlement, see Embezzlement, 3-5.
Condemnation proceedings, see Eminent Domain, 4.
In action for fraud, see Fraud.
Of notice to county of defects in road, see Highways, 2.
In prosecution for murder, see Homicide, 2.
Community or separate character of property, see Husband and Wife, 4.
On insurance policies, see Insurance, 3.
Of unlawful possession of liquor, see Intoxicating Liquors, 1, 3.
Relation of landlord and tenant, see Landlord and Tenant, 1, 2.
In action against landlord for damages through negligence, see Landlord and Tenant, 3, 4.

Evidence—Continued.

To forfeit contract for sale and removal of timber, see LOGS AND LOGGING, 3.
For injuries to servant or third person, see MASTER AND SERVANT, 2, 4, 5.
Character of deed as mortgage, see MORTGAGES, 1.
For injuries in streets, see MUNICIPAL CORPORATIONS, 8, 12.
In action for damages through breaking of water main, see MUNICIPAL CORPORATIONS, 16.
Of negligence in causing fire, see NEGLIGENCE.
Newly discovered evidence as ground for new trial, see NEW TRIAL, 4.
In prosecution for nuisance, see NUISANCE, 2, 3.
Of malpractice, see PHYSICIANS AND SURGEONS, 4.
Admissibility of evidence under pleading, see PLEADING, 8, 9.
Existence of agency, see PRINCIPAL AND AGENT, 1.
Authority of agent, see PRINCIPAL AND AGENT, 3, 4.
Of other acts, see RAPE.
Of modification of contract, see SALES, 1.
Of fraud in issuance of certificate of inspection, see SALES, 2.
For injuries to persons on or near tracks, see STREET RAILROADS, 1, 2.
Effect of burden of proof as giving right to open and close, see TRIAL, 1.
Applicability of instructions to evidence, see TRIAL, 3.
Of accretion in water course, see WATERS AND WATER COURSES, 5.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE (2) — JUDICIAL NOTICE — COMMON KNOWLEDGE. The courts will take notice that coal oil poured on coals in a kitchen stove may cause an explosion. *Jordan v. Rieker*..... 513

2. SAME (48)—COMPETENCY—VALUE OF PROPERTY—COSTS OF REPAIRS. In an action for damages to an automobile, it is error to exclude evidence of the cost of repairs and the purchase price obtained in a sale after the repairs, since they are elements tending to show its value after the damage. *Madden v. Nippon Auto Co*..... 618

3. EVIDENCE (59)—RELEVANCY—SIMILARITY OF CONDITIONS. Upon an issue as to damages for breach of implied warranty in the sale of canned tomatoes, which were apparently in good condition when delivered but spoiled within six months, it is proper comparison to admit evidence that other tomatoes were kept in the same place during the same time and did not deteriorate; also to exclude testimony that other goods packed by the seller at the same time but not having similar storage had not developed trouble. *Los Angeles Olive Growers Association v. Pacific Grocery Co*..... 293

Evidence—Continued.

4. EVIDENCE (99) — WITNESSES (48) — SELF-SERVING STATEMENTS — TRANSACTION WITH DECEASED—BOOKS. In an action by an executrix, involving a mercantile partnership account, defendant's identification of the books, kept in the usual course of business, is not objectionable as evidence of transactions with the deceased, nor as self-serving. *McDonald v. McDonald*..... 396

5. EVIDENCE (99, 148)—SELF-SERVING DECLARATIONS—TO VARY WRITING—CONTRACT FOR SALE OF LAND. Where co-owners of a tract each listed his interest with a broker for sale at a certain price and neither party had knowledge of the listing by the other, the listing prices were merely self-serving declarations as to the value, and insufficient to overcome a contract reciting that they were equally interested in the contract of sale made by the broker. *Bemis v. Meyer* 599

6. EVIDENCE (100)—SELF-SERVING DECLARATIONS—BY PERSONS SINCE DECEASED. In an action by administrators for an accounting, self-serving letters and bank statements of the deceased in his own interest are inadmissible. *Levy v. Simon*..... 179

7. EVIDENCE (214)—EXPERTS—FACTS FORMING BASIS OF OPINION. A patient's statements to a physician testifying as an expert, are admissible to determine the weight to be given to the physician's opinion, but not as evidence to prove the actual condition of the patient at the time. *Estes v. Babcock*..... 270

8. EVIDENCE (216, 217)—OPINION EVIDENCE—CROSS-EXAMINATION—VALUE OF PROPERTY. An opposing party is entitled, on cross-examination, to inquire into the factors taken into consideration by the witness in arriving at his estimate of the value of an automobile, injured in an accident, especially where the witness stated two elements taken into consideration in arriving at his estimate as the cost of repairs and general depreciation in value. *Madden v. Nippon Auto Co*..... 618

Examination:

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 6-10.

Exceptions, Bill of:

Presentation and reservation of grounds of review in record, see APPEAL AND ERROR, 11, 12.

Excessive Damages:

For personal injuries, see DAMAGES, 2, 3.
As ground for new trial, see NEW TRIAL, 3.

Excuse:

For delay in performing contract, see CONTRACTS, 5.
For delay in furnishing bill of particulars, see DISCOVERY.

Execution:

See ATTACHMENT.

1. EXECUTION (91)—SUPPLEMENTARY PROCEEDINGS—CLAIMS BY THIRD PERSONS. In proceedings supplemental to execution, under Rem. Code, § 620, authorizing an order for the delivery of property "the right to the possession whereof is not substantially disputed," the court cannot require the delivery of money placed in the hands of and claimed by an attorney, advanced to him to cover the cost of and for the purpose of presenting an appeal for the judgment debtor. *Bounds v. Galbraith* 596

Executive Power:

See CONSTITUTIONAL LAW, 4.

Executors and Administrators:

1. EXECUTORS AND ADMINISTRATORS (146)—CLAIMS—SET-OFF. One sued by an executrix of the estate may plead as an offset a claim against the deceased, without having presented a claim against the estate, although it is limited to extinguishment of the debt. *McDonald v. McDonald* 396

2. EXECUTORS AND ADMINISTRATORS (146)—CLAIMS—COUNTERCLAIM. In an action by an executrix, it is error to give an affirmative judgment on a counterclaim in excess of plaintiff's claim, where no claim was presented against the estate as required by the statute of non-claim. *McDonald v. McDonald* 396

3. EXECUTORS AND ADMINISTRATORS (154) — ACTIONS — JUDGMENT — LIEN. In an action against an executor to recover money collected by the decedent under an agreement on the sale of mining claims, contemplating also an incorporation of a company and a further payment in stock, the plaintiff is not entitled to have the judgment recovered declared a specific lien on the money of the estate, in the absence of proof of fraud, and cannot ask more than the establishment of a lien against decedent's interest in the mining claims, no company having been formed or stock delivered. *Arneson v. Copeman* 659

Expert Testimony:

In civil actions, see EVIDENCE, 7, 8.

Explosives:

Negligence in causing explosion and fire, see NEGLIGENCE.

Extras:

Right to lien for furnishings, see MECHANICS' LIENS, 2.

False Representations:

See FRAUD.

Federal Courts:

Rule of decision, see COURTS.

Fees:

Attorney's fees in action for separate maintenance, see HUSBAND AND WIFE, 5.

Felony:

Necessity for preliminary hearing before filing information, see INDICTMENT AND INFORMATION, 1.

Filing:

Chattel mortgage, see CHATTEL MORTGAGES, 1-4.

Claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Criminal information or complaint, see INDICTMENT AND INFORMATION, 1.

Partnership certificate as condition precedent to action, see PARTNERSHIP, 3.

Final Orders:

Review on appeal by state, see CRIMINAL LAW, 20, 21.

Findings:

Review as dependent on presentation of objection or exceptions below, see APPEAL AND ERROR, 5, 6, 8-10, 13.

Review on appeal or writ of error, see APPEAL AND ERROR, 16-18.

To sustain decree on ground of cruelty, see DIVORCE, 2.

Fires:

Injunction against destruction of building in fire limits, see INJUNCTION.

Negligence in causing, see NEGLIGENCE.

Fish:

Limitation of action for damages to fishing location, see LIMITATION OF ACTIONS.

1. FISH (6)—LICENSES—RIGHTS UNDER. Rights acquired under a roving fishing license, although fixed by a definite location and survey, are not vested rights in real property. *Irwin v. J. K. Lumber Co.* 158

Flight:

Instructions as to flight of accused, see CRIMINAL LAW, 25.

Flooding:

Liability of city for defect in water main, see MUNICIPAL CORPORATIONS, 15, 16.

Forcible Entry and Detainer:

Action for unlawful detainer of leased premises, see LANDLORD AND TENANT, 5.

1. FORCIBLE ENTRY AND DETAINER (1)—LANDLORD AND TENANT (126)—ACTIONS—EXISTENCE OF RELATION—STATUTES. Under Rem. Code, § 812, unlawful detainer may be maintained against one who enters without permission or color of right, although the conventional relation of landlord and tenant does not exist. *Lake Union Realty Co. v. Woolfield* 331

2. FORCIBLE ENTRY AND DETAINER (2)—NOTICE TO QUIT—SUFFICIENCY. Under subdiv. 3, Rem. Code, § 812, a notice in unlawful detainer against one entering without permission or color of right, properly requires, in the alternative, a surrender of the premises or the payment of rent. *Lake Union Realty Co. v. Woolfield* 331

Foreclosure:

Of mechanics' lien, see MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 2, 3.

Foreign Corporations:

Service of process on agent of, see CORPORATIONS, 3.

Forfeiture:

Of bail, see BAIL.
Of contract for sale and removal of timber, see LOGS AND LOGGING.

Former Adjudication:

As bar to action, see JUDGMENT, 1-7.

Forms of Action:

See ACTION.

Franchise:

As affecting change of rates for gas, see GAS, 1.

Fraud:

In sale of personalty, see SALES, 2.

1. FRAUD (22)—EVIDENCE—SUFFICIENCY. Obscurity in the language of a written contract is not alone sufficient to establish fraud, in

Fraud—Continued.

the absence of any evidence of overreaching. *Arneson v. Copeman* 659

2. FRAUD (22)—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. The purchaser of arid land to be irrigated and the water rights, through false representation as to the situation of the land, is entitled to recover his damages, where the land could not be irrigated by gravity flow from the canal. *Stager v. Burbank Co.* 516

Frauds, Statute of:

1. FRAUDS, STATUTE OF (22)—SALE OF GOODS—CONTRACT—VALIDITY. An oral agreement for the sale of fruit boxes of a value amounting to thousands of dollars is void under Rem. Code, § 5290, requiring contracts for the sale of merchandise the value of fifty dollars or more to be in writing. *Leavenworth State Bank v. Wenatchee Northern Warehouse & Marketing Co.* 39

2. FRAUDS, STATUTE OF (35, 48)—CONTRACT—DESCRIPTION OF LANDS—POSSESSION—PERFORMANCE. A letter from a mother to a daughter offering to give her home to the daughter if the latter will come and take care of her is sufficient proof of the contract between them though there is no description of the premises, where the daughter went into possession of the home property and completely performed the obligations contemplated by the contract. *Slavin v. Ackman.* 48

3. FRAUDS, STATUTE OF (42)—OPERATION AND EFFECT—PART PERFORMANCE. One who in good faith goes into the possession of land under an oral contract to purchase, and incurs expense in reliance on the contract, may recover as damages the value of the work done. *Muckle v. Hoffman* 519

4. FRAUDS, STATUTE OF (49) — PART PERFORMANCE — IMPROVEMENTS AND TAKING POSSESSION. A parol partition of lands held jointly by tenants in common is not established, under the statute of frauds, where there was no taking of possession in severalty or the making of permanent improvements. *Bemis v. Meyer*..... 599

Funds:

Commingled funds as community property, see HUSBAND AND WIFE, 3.

Garnishment:

1. GARNISHMENT (23-26) — PROCEEDINGS TO PROCURE — BOND. Rem. Code, § 680, authorizing writs of garnishment in an action where an original attachment has been issued (in which case the plaintiff must have executed an attachment bond), without requiring any garnishment bond, must be construed as *in pari materia* with the attachment law; and renders the surety on the attachment bond liable for the wrongful issuance of a writ of garnishment in aid of the attach-

Garnishment—Continued.

ment; otherwise the law would authorize a garnishment without the security of any bond. *Paltro v. Aetna Casualty & Surety Co.*. 101

2. GARNISHMENT (58)—PROPERTY PLEDGED. Proceeds of a draft, secured by a pledge of the documents to one who loaned money to the drawer, cannot be garnished as the property of the drawer. *Pioneer Lumber Co. v. Gevurtz* 133

Gas:

1. GAS (3)—CHARGES—PUBLIC SERVICE COMMISSION. It is the policy of the public service law to permit a public utility to receive a fair and reasonable return upon the reasonable value of its property, and the department has the right to order a departure from a franchise contract, which by Laws 1911, p. 561, § 34, is binding until the department has ordered a departure therefrom. *State ex rel. Spokane v. Kuykendall* 107
2. SAME. Under the Public Service Act, Rem. Code, § 8626-92 [Rem. Comp. Stat., § 10441] the physical value of a gas company's property once fixed, is an established base; and at subsequent hearings, the commission must ascertain the betterments, additions and improvements and reproducing costs; but an allowance of cost price is not prejudicial to a company where it is not shown that there has been any advance in the cost of material used in making the betterments. *State ex rel. Spokane v. Kuykendall* 107
3. SAME. The reasonableness of an expenditure incurred in obtaining new business by a gas company is within the regulatory power of the department of public works, and hence part may be disallowed in considering the value of its property for rate making. *State ex rel. Spokane v. Kuykendall* 107

General Custom:

See CUSTOMS AND USAGES.

General Denial:

See PLEADING, 1, 8, 9.

Gifts:

Charitable gifts, see CHARITIES.

Good Faith:

Of purchaser, see BILLS AND NOTES, 1.

Habeas Corpus:

Right of defendant to discharge on sustaining demurrer to information, see INDICTMENT AND INFORMATION, 3.

1. HABEAS CORPUS (24)—DISCHARGE—BAR. A discharge on habeas corpus of one extradited and brought to this state upon a complaint

Habeas Corpus—Continued.

before a justice of the peace, on the ground that the complaint was unfounded, that no crime had been committed, and that the extradition was irregular and illegal, is not a bar to a prosecution for the same crime, under an amended information filed by the prosecuting attorney. *State v. Shears* 275

Harmless Error:

In civil actions, see APPEAL AND ERROR, 19-22.
In criminal prosecutions, see CRIMINAL LAW, 23, 25.

Health:

Charitable devise for teaching of system of treatment as against public policy, see CHARITIES.

1. HEALTH (5, 6)—REGULATION—POWER TO MAKE—CONTAGIOUS DISEASES. The state board of health has power, under Rem. Code, § 5406 [Rem. Comp. Stat., § 6001], to provide quarantine regulations fixing isolation periods for unvaccinated pupils and teachers which are binding and conclusive in the courts, unless it can be said that they are arbitrary, capricious or unreasonable. *State ex rel. Lehman v. Partlow* 316

2. SAME (5, 6). A valid order of the director of health as to the vaccination of school children and fixing an isolation period for unvaccinated persons is binding upon school directors in their official capacity, and authorizes them to make an order enforcing the regulations. *State ex rel. Lehman v. Partlow* 316

Hearing:

For establishment of gas rates, see GAS.

Hearsay:

In criminal prosecutions, see CRIMINAL LAW, 5.

Highways:

1. HIGHWAYS (61)—DEFECTS—DUTY OF MAINTENANCE—LIABILITY OF COUNTY—STATUTES. Under Laws 1917, ch. 118, p. 468, providing that each county should maintain a "permanent highway maintenance fund" for the upkeep of permanent highways established within its limits by the state, to which fund moneys theretofore held by the state to the credit of the county for maintenance should be turned over to the county, which money was to be expended by the county for maintenance and repair of primary, permanent or like highways within its limits, the duty of maintaining such highways is placed on the county in its corporate capacity, and not as a direct agent of the state; and extends to the curing of defects in the original construction by the state, in view of the established rule of the courts prior to the enactment that "maintenance" is to be construed as the

Highways—Continued.

keeping of highways in a reasonably safe condition for ordinary travel. [See Rem. Comp. Stat., §§ 6821-6824.] *McClung v. King County* 14

2. SAME (64) — DEFECTS — NOTICE TO COUNTY — EVIDENCE — SUFFICIENCY. Notice to county commissioners that a highway was dangerous by reason of inherent defects is amply supported by evidence that its condition had been reported to them by the county engineer every year during a period of four years, with plans to obviate the defects. *McClung v. King County* 14

Homicide:

Declarations of injured person as part of *res gestae*, see CRIMINAL LAW, 2, 3.

Evidence in prosecution for, see CRIMINAL LAW, 2-4.

Rights of accused to discharge, after order sustaining demurrer to information, see CRIMINAL LAW, 21.

1. HOMICIDE (3½)—FIRST DEGREE—KILLING IN PERPETRATION OF LARCENY—CONTINUING OFFENSE. The offense of larceny is a continuing one, and possession of the stolen property after the crime constitutes a continuance of the offense, making the killing of an officer while accused was in the act of driving away a car, stolen the night before, murder in the first degree. *State v. Daniels* 557

2. HOMICIDE (83, 90-1)—FIRST DEGREE—QUESTION FOR JURY. The finding of murder in the first degree on conflicting evidence, was a question for the jury, where it appears that, although the defendant may have killed deceased in anticipation of trouble when the deceased called on him relative to accusations defendant had made against deceased's son, his defense of a killing in self-defense, after a struggle, is discredited and appears to have been manufactured. *State v. Colagino* 301

3. HOMICIDE (268)—QUESTION FOR JURY—COMPLETION OF LARCENY BEFORE KILLING. In a prosecution for first degree murder, under Rem. Comp. Stat., § 2392, subdiv. 3, for the killing of a policeman while accused was engaged in the larceny of an automobile, whether the crime of larceny had been completed was properly left to the jury, where the accused had stolen the car at ten o'clock the night before, driven it six or seven miles, and left it and returned the next morning and were in the act of starting it, when the officer arrived and was shot and killed by one of their associates. *State v. Daniels* 557

Husband and Wife:

Divorce and judicial separation, see DIVORCE.

Husband as participator in unlawful possession of liquor by wife, see INTOXICATING LIQUORS, 2.

Husband and Wife—Continued.

1. HUSBAND AND WIFE (47-1)—COMMUNITY PROPERTY—ACQUIRED BEFORE MARRIAGE. The status of a bakery plant and business acquired before marriage by the use of separate funds and the pledging of separate credit is separate property. *Jacobs v. Hoitt* 283

2. SAME (51, 56). Where a husband had put $8,000 of separate funds into a bakery plant before marriage, and, after the community was created, $6,000 was added which could be presumed to be community property, eight parts of the present value of the plant can be said to be separate property and six parts, community property. *Jacobs v. Hoitt* 283

3. SAME (51, 56)—COMMUNITY PROPERTY—CONFUSION OF FUNDS—PROFITS OF SEPARATE BUSINESS. Profits from the husband's separate business, increased by the labor and effort of husband and wife, constitute separate property, to the extent of such earnings, where they can be separated; but money in the bank which it is impossible to segregate as to its sources, so confused that it cannot be apportioned, will be regarded as community property in view of the presumptions and favor of the law in which it is regarded. *Jacobs v. Hoitt* 283

4. SAME (58, 60)—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE—SUFFICIENCY. The presumption that property, once separate, remains so, will not be overthrown by an alleged understanding between husband and wife, in the absence of any agreement between them to that effect, especially as against existing creditors. *Jacobs v. Hoitt* 283

5. HUSBAND AND WIFE (111)—SEPARATE MAINTENANCE—AMOUNT OF AWARD AND RELIEF. In an action for separate maintenance, the court has power to award monthly payments of $75 out of earnings of $168, together with costs of suit and $100 attorney's fees. *Morden v. Morden* 176

Impeachment:

Of verdict by affidavits of jurors, see NEW TRIAL, 5.
Of witnesses, see WITNESSES, 6-8.

Implied Contracts:

See LIMITATION OF ACTIONS, 1.

Implied Warranty:

On sale of goods, see SALES, 3, 4.

Imprisonment:

Inquiry into legality of, see HABEAS CORPUS.

Improvements:

Possession and improvements as part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 4.

Liens, see MECHANICS' LIENS.

To state armory, power of officers, see STATES.

Incompatibility:

As ground for divorce, see DIVORCE, 1.

Incumbrances:

See MORTGAGES.

Indemnity Insurance:

Authority of company to write, see INSURANCE, 1, 2.

Indictment and Information:

Sufficiency of as effecting discharge of bail bond, see BAIL, 1.

Charging unlawful loan of funds to officer, see BANKS AND BANKING, 1.

Election between acts charged, see CRIMINAL LAW, 9, 10.

Appeal by state from order sustaining demurrer to information, see CRIMINAL LAW, 20, 21.

1. INDICTMENT AND INFORMATION (16)—PRELIMINARY PROCEEDINGS. A preliminary hearing before a justice of the peace, of one charged with a felony, is not necessary to the filing of an information. *State v. Shears* 275

2. INDICTMENT AND INFORMATION (72)—DUPLICITY—CONTINUING OFFENSES. An information charging that an agent of insurance companies at divers times and continuously between January 1, 1917, and September 22, 1918, had custody and control as such agent of $3,500, which he feloniously withheld and appropriated to his own use, does not charge a multiplicity of crimes. *State v. Shears*.. 275

3. INDICTMENT AND INFORMATION (87)—HABEAS CORPUS (15, 24)—DISCHARGE—POWER OF COURT. In habeas corpus proceedings to release accused, held in custody under a warrant for a non-bailable offense, the information does not become *functus officio* by the sustaining of a demurrer, with leave to amend, in view of the fact that our statutory provisions do not contemplate a discharge until the case is dismissed, and of the inherent power of the court to commit persons judicially before them, and in view of Rem. Code, § 2103, providing that, if the case be resubmitted a defendant in custody shall remain so. *State ex rel. Anderson v. Callahan* 535

Industrial Insurance:

See MASTER AND SERVANT, 6-9.

Infants:

Rape of infant females, see RAPE.

Information:

Criminal accusation, see INDICTMENT AND INFORMATION.

Inheritance Tax:

See TAXATION, 4, 5.

Injunction:

Scope of review on appeal from order, see APPEAL AND ERROR, 14.
Review of order denying temporary injunction, see CERTIORARI, 1.

1. INJUNCTION (8)—GROUNDS FOR RELIEF—INSOLVENCY OF DEFENDANT. In an action for an injunction to restrain the demolishing of a building by a city building inspector and fire chief, who were married and possessed of no separate property, the plaintiff is entitled to a finding that defendants were insolvent, in view of the grave doubt as to liability of their community estates for the acts about to be committed. *State ex rel. Marshall v. Superior Court*. 631

2. SAME (55, 56) — RIGHT TO TEMPORARY INJUNCTION — IRREPARABLE INJURY. Plaintiff is entitled to a temporary injunction against the threatened destruction of a wooden building in the fire limits, on account of its gradual deterioration through age, where there was no emergency or sudden casualty such as a fire, in view of the insolvency of the officers and the debatable nature of the liability of the city for their acts; and in view of the irreparable nature of the injury and the slight injury or inconvenience from temporarily delaying the destruction until the final disposition of the case. *State ex rel. Marshall v. Superior Court* 631

Insane Persons:

1. INSANE PERSONS (14) — PARENT AND CHILD (4-1) — SUPPORT OF CHILD. A divorced husband is not liable to the wife for expenses in maintaining an insane child in a private asylum, where the child had been regularly committed to a state institution, and was paroled on the request of the mother who agreed to pay the expense of maintaining the child, and it does not appear that the child received any better treatment or that the removal was reasonably necessary for the welfare of the child. *Smith v. Pontius* 211

Insolvency:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.
As ground for injunction, see INJUNCTION.

Inspection:

Of goods sold, see SALES, 1, 2.

Instructions:

Review as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 7.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 22; CRIMINAL LAW, 24, 25.

In criminal prosecutions, see CRIMINAL LAW, 12, 13, 24, 25; INTOXICATING LIQUORS, 2.

In civil actions, see TRIAL, 3.

Insurance:

1. INSURANCE (1)—AUTHORITY TO DO BUSINESS—INDEMNITY INSURANCE. An "Automobile Insurance Exchange," having complied with Rem. Code, § 6059-85, for the organization of "interinsurers," brings itself within the definition (Id., § 6059-2) of a "company" authorized to write insurance, and is such a company within Laws 1921, p. 341, § 5 [Rem. Comp. Stat., § 6391], requiring surety bonds from a company licensed to "make liability insurance," for all automobiles transporting passengers for hire. [See Rem. Comp. Stat., §§ 7033, 7130.] *State ex rel. Automobile Insurance Exchange v. Kuykendall* 235

2. SAME. Subdivision 13½ of Rem. Code, § 6059-83, having been added to the insurance code, expressly authorizing motor vehicle insurance against liability resulting through operation of the vehicle or transportation, the same falls within Laws 1921, p. 341, § 5 [Rem. Comp. Stat., § 6391], requiring jitney surety bonds from a company authorized to "make liability insurance," easily and radically differing from the class of subdivision 6, § 6059-83 [Rem. Comp. Stat., §7128], covering employers' liability insurance. *State ex rel. Automobile Insurance Exchange v. Kuykendall* 235

3. INSURANCE (188) — LARCENY (37) — ACTION ON THEFT POLICY — ASPORTATION—QUESTIONS FOR JURY. In an action on an auto theft policy, the question of asportation is for the jury, where there was evidence from which the jury could find that the car was parked on a grade, with brakes set and the gears locked, preventing propulsion by the engine, and that a third person entered the car, released the brakes and ran it down hill, abandoning it; since theft is not dependent upon the length of time that property is converted or the extent of the use. *Price v. Royal Insurance Co.* 93

Intent:

Of master to produce injury, under workmen's compensation act, see MASTER AND SERVANT, 8.

Interest:

On advances made by partner, see PARTNERSHIP, 2.

On inheritance tax, see TAXATION, 4, 5.

Interlocutory Orders:

Review of, see APPEAL AND ERROR, 2; CERTIORARI, 2, 3.

Interrogatories:

In proceeding for discovery, see DISCOVERY.

Intoxicating Liquors:

Complaint in action against county for services in enforcement of liquor law, see COUNTIES.

1. INTOXICATING LIQUORS (30, 50)—OFFENSES—ILLEGAL POSSESSION—EVIDENCE—SUFFICIENCY. In a prosecution for the unlawful possession of whiskey, whether the presumption from ownership of the premises was sufficiently rebutted, or whether the quantity was so negligible as not to be available for unlawful use, are for the jury, where the liquor was found in defendant's house in a sink near a glass, it filled an ordinary pint milk bottle to a height of about two inches, and the defendant's wife tried to keep it from the officers, though defendant denied any knowledge of it. *State v. Arrigoni.* 358

2. SAME (30, 51)—ILLEGAL POSSESSION—INSTRUCTIONS. It is proper to instruct that, if a husband knowingly permits his wife to keep intoxicating liquors in the house for an illegal purpose, he is a participator in, and guilty of, the unlawful possession. *State v. Arrigoni* 358

3. INTOXICATING LIQUORS (53)—SEARCHES AND SEIZURES—WITHOUT WARRANT—PROPERTY SUBJECT. In a prosecution for unlawful possession of intoxicating liquor, seized by officers without a warrant, a motion to suppress the evidence is properly denied, where the officers entered the place when the door was opened to admit one of the general public, it required no search to find the liquor, which was in the actual, open, physical possession of the defendant, under circumstances showing that he had been making unlawful use of it. *State v. Llewellyn* 306

Irreparable Injury:

As ground for injunctive relief, see INJUNCTION, 2.

Irrigation:

See WATERS AND WATER COURSES, 1-3, 6-8.

Joint Tenancy:

See TENANCY IN COMMON.

Judgment:

Order of dismissal of consolidated actions as bar, see ACTION, 2.
Review in general, see APPEAL AND ERROR.
In criminal proceedings, see CRIMINAL LAW, 17-20.

Judgment—Continued.

In actions by or against administrators, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Discharge on *habeas corpus* as bar, see HABEAS CORPUS.

Judgment on pleadings, see PLEADING, 7.

Apportionment of waters for irrigation, see WATERS AND WATER COURSES, 6-8.

1. JUDGMENT (182, 213-1) — CONCLUSIVENESS — BAR — DISMISSAL FOR WANT OF JURISDICTION. The dismissal of an action "with prejudice" by a court not having jurisdiction does not operate against a full and fair hearing subsequently before a tribunal properly invested with jurisdiction to hear the controversy. *Maddox v. Industrial Insurance Commission* 21

2. JUDGMENT (183)—RES JUDICATA—FINALITY—REVERSAL ON APPEAL. On the reversal of a judgment, rendered below on the merits, it ceases to be *res judicata* thereon. *Peterson v. Morris* 335

3. SAME (188, 189)—RES JUDICATA—MERITS OF CONTROVERSY. The dismissal of a cause of action brought by a partnership, for the reason that the plaintiffs then had no capacity to sue, by reason of failing to file the precedent statutory partnership statement, is not *res judicata* on the merits or a bar to a subsequent suit in which they had capacity to sue. *Peterson v. Morris* 335

4. JUDGMENT (200)—RES JUDICATA—PARTIES CONCLUDED—PRIVITY. A proceeding by a judgment creditor in aid of execution wherein it was determined that certain property of the judgment debtor was subject to the execution and should be sold by the sheriff, is *res judicata* and a bar to a subsequent suit by the judgment debtor to enjoin the sheriff from making the sale; and objection that the parties are different is unavailing, since the sheriff is in privity with the judgment creditor, and *res judicata* applies to those in privity with the parties. *Symons v. Hutchinson* 430

5. JUDGMENT (214)—BAR—SCOPE OF ESTOPPEL. The reversal of an order quashing an alternative writ of mandamus and consequent reinstatement of the writ becomes of no moment when the parties stipulate that the determination of a pending cause shall be conclusive in the prior one. *State ex rel. Automobile Insurance Exchange v. Kuykendall* 235

6. JUDGMENT (219)—BAR—DISTINCT CAUSES. A judgment dismissing an action of unlawful detainer for vendors' failure to deliver possession of land upon which there was a growing crop is not *res adjudicata* or a bar to an action by the vendee for breach of covenant for loss of the crop removed by vendors' tenant. *Miller v. Smith* 163

7. SAME (222)—MATTERS CONCLUDED—ACTUALLY LITIGATED. In a proceeding in aid of execution, although the question that the judg-

Judgments—Continued.

ment was dormant was not raised by a formal pleading, a judgment, unappealed from, is *res judicata* of the question where it was raised orally, considered and actually decided. *Symons v. Hutchinson*. 430

8. JUDGMENTS (274)—ACTIONS ON—LIMITATIONS. Under Rem. Code, §§ 459, 460, providing that a judgment shall cease to be a lien and that no action thereon shall extend the duration of the "judgment, claim or demand" beyond six years from the date of the judgment, in a second action on a liability arising since the enactment of the statute (in 1897) the duration of the judgment must be limited to six years from the date of the former judgment. *Ball v. Bussell*. 206

Judicial Notice:

See EVIDENCE, 1.

Judicial Power:

See CONSTITUTIONAL LAW, 3.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1, 2.

To enforce judgment, after suspension of sentence, see CRIMINAL LAW, 18, 19.

Jury:

Prejudice or misconduct ground for new trial, see CRIMINAL LAW, 14, 15.

Instructions in criminal prosecutions, see CRIMINAL LAW, 12, 13, 24, 25.

Verdict in criminal prosecutions, review, see CRIMINAL LAW, 22.

Misconduct of jurors ground for new trial, see NEW TRIAL, 2, 5.

Impeachment of verdict by testimony or statements of jurors, see NEW TRIAL, 5.

Instructions in civil actions, see TRIAL, 3.

1. JURY (4)—RIGHT TO TRIAL BY JURY—ACCOUNTING. Where the pleadings show that the action involves a partnership and a large number of mutual accounts between the parties, undoubtedly requiring an accounting, a jury trial is properly denied. *Levy v. Simon* 179

Knowledge:

Defenses to bills or notes, see BILLS AND NOTES, 1.

Judicial notice of matters of common knowledge, see EVIDENCE, 1.

By husband of unlawful possession of liquor by wife, see INTOXICATING LIQUORS, 2.

Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 1, 4, 5, 10.

Lakes:

Navigability of, see NAVIGABLE WATERS.
Appropriation of waters for irrigation, see WATERS AND WATER COURSES, 1-3.

Landlord and Tenant:

Form of action for loss of crop removed by tenant, see ACTION, 1.
Unlawful detainer of premises, see FORCIBLE ENTRY AND DETAINER.
Amendment of complaint for rent due, to sustain recovery on *quantum meruit*, see PLEADING, 4.

1. LANDLORD AND TENANT (4)—LEASE—EXISTENCE OF RELATION—EVIDENCE. A finding of a verbal lease for 115 months at six dollars per month is not sustained where respondent was the only one who testified to the fact, he was squarely contradicted, and never made any claim for rent during the entire period, and services rendered offset any claim for use and occupation. *Rude v. Coulter Tow Boat Co*..... 60

2. LANDLORD AND TENANT (4)—EXISTENCE OF RELATION—EVIDENCE. The business manager of a tenant on leased premises, who, after termination of the lease, assumed possession without color of right or recognition, is not a tenant; and the conventional relation does not exist from the fact of his having previously given checks for the rent on behalf of the lessee for whom he was working. *Lake Union Realty Co. v. Woolfield*..... 331

3. LANDLORD AND TENANT (60)—INJURY TO PREMISES BY LANDLORD—NEGLIGENCE—DEFENSES. The fact that blasting on leased premises was done by an independent contractor, employed by the landlord to do the blasting, is no defense to the tenant's action for damages to the demised premises, and disturbing the tenant's quiet possession thereof; especially where the operations were supervised by the landlord, and were wilfully designed to disturb the tenant. *Alexis v. Pittinger* 626

4. SAME (60)—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a landlord reserves the right to clear uncleared portions of the land leased, the fact that the usual and customary method was by blasting with stumping powder would not justify the negligent and wanton use of excessive charges of powder in such a manner as to unnecessarily injure, damage and deprive a lawful tenant of peaceable possession of the premises not being cleared. *Alexis v. Pittinger* 626

5. LANDLORD AND TENANT (101)—RENT—SURRENDER. Where the landlord fails, on notice and demand, to make necessary repairs to premises that had become unsafe, and breached its covenant to keep the premises in repair, the tenant is justified in abandoning the

Landlord and Tenant—Continued.

premises and is not liable for rent after such surrender. *Stevens & Co. v. Pratt*..... 232

6. LANDLORD AND TENANT (129)—UNLAWFUL DETAINER—DEFENSES. An arbitration and award between a landlord and tenant, whereby the tenant was to retain possession of the leased premises until the landlord had made full repayment of a substantial sum in cash, goes solely to the right of possession and therefore is a good defense to an action of unlawful detainer. *Taylor v. Basye*..... 263

Lands:

See PUBLIC LANDS.

Lapse of Time:

As affecting right to appeal, see APPEAL AND ERROR, 3, 4.

Larceny:

Larceny of goods by one having possession thereof, see EMBEZZLEMENT.

Killing while engaged in larceny, see HOMICIDE, 1, 3.

Duplicity in charging, see INDICTMENT AND INFORMATION, 2.

Action on auto theft policy, see INSURANCE, 3.

1. LARCENY (1)—OFFENSES CONSTITUTING—STATUTES. Rem. Comp. Stat., § 2601, making it larceny to take, lead or drive away the property of another with intent to deprive the owner thereof, defines a distinct offense and is not superseded by Id., § 2601-1, providing that any one who intentionally takes or drives away any motor vehicle of another shall be deemed guilty of a felony; and the latter offense does not necessarily include the idea of theft. *State v. Daniels*.. 557

Leases:

See LANDLORD AND TENANT.

Legislative Power:

See CONSTITUTIONAL LAW, 2, 3.

Levy:

Of school tax, see SCHOOLS AND SCHOOL DISTRICTS, 5, 6.

Of taxes, see TAXATION, 2.

Licenses:

Rights under fishing license, see FISH.

Of domestic and foreign insurance companies to do business, see INSURANCE, 1, 2.

Physicians and surgeons, see PHYSICIANS AND SURGEONS, 1-3.

Liens:

Mortgage, see CHATTEL MORTGAGES.
Of judgment against estate, see EXECUTORS AND ADMINISTRATORS, 3.
Judgment lien, see JUDGMENT, 8.
For material or labor, see MECHANICS' LIENS.
Of co-owner for share of purchase price, see TENANCY IN COMMON, 2.

Limitation:

Of indebtedness and expenditures of municipality, see MUNICIPAL CORPORATIONS, 17-19.

Limitation of Actions:

See ADVERSE POSSESSION.
On domestic judgment, see JUDGMENT, 8.
As defense in foreclosure of mortgage, see MORTGAGES, 3.

1. LIMITATION OF ACTIONS (19, 19-1)—INJURY TO OR TAKING OF PROPERTY. An action against a public service corporation for destruction of or injury to a fishing location, occupied under annual state licenses, is subject to the three-year statute of limitations [Rem. Code, § 159] for injuries to personal property or other injury to the person or rights of another, whether considered as an action in tort, or one of implied contract for taking property without condemnation and prepayment of compensation. *Irwin v. J. K. Lumber Co.* 158

2. SAME (65-1)—TOLLING—NEW ACTION AFTER FAILURE OF FORMER ACTION. Rem. Code, § 173, tolling the statute of limitations in case a judgment for the plaintiff be reversed if an action be commenced within one year thereafter, does not apply where no cause of action was stated or existed when the first cause of action was commenced; hence limitations upon an action for damages to a fishing location are not tolled by plaintiff's prior injunction suit in which judgment for plaintiff was reversed on the ground that injunction did not lie against the public service company. *Irwin v. J. K. Lumber Co.* 158

Liquors:

See INTOXICATING LIQUORS.

Loans:

Unlawful loans to officers, see BANKS AND BANKING.

Logs and Logging:

1. LOGS AND LOGGING (1)—SALE OF STANDING TIMBER—CONTRACTS—FORFEITURE. A forfeiture of a contract for the sale and removal of standing timber must be on one of the grounds specified in the notice of forfeiture. *Mullins v. Larsen*..... 490

Logs and Logging—Continued.

2. SAME (1)—WAIVER. The seller's right to forfeit a contract for the sale of standing timber to be cut and hauled to the vendee's mill, on the ground of his removal of the mill, is waived by accepting stumpage on shipments elsewhere, as agreed upon. *Mullins v. Larsen* 490

3. SAME (1)—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a forfeiture of a contract for the sale of standing timber, on account of leaving merchantable timber on the ground, where many witnesses testified that it was unmerchantable, and if a breach of the spirit of the contract, the loss was fully covered by an advance payment. *Mullins v. Larsen*..... 490

Machinery:

Right to lien for use of, see MECHANICS' LIENS, 1.

Maintenance:

Separate maintenance of wife, see DIVORCE, 1; HUSBAND AND WIFE, 5.

Mandamus:

Cessation of controversy on appeal, see APPEAL AND ERROR, 4.

1. MANDAMUS (52)—ISSUE OF WARRANTS FOR PAYMENT. Mandamus lies to compel the issuance of a county warrant upon a claim under a written contract, which was arbitrarily rejected by the county commissioners. *Revelare International Secret Service v. Whatcom County* 646

Malpractice:

By physicians, see PHYSICIANS AND SURGEONS, 4.

Maps:

Admissibility in criminal prosecution, see CRIMINAL LAW, 7.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Filing claim under workmen's compensation act as election of remedy, see ELECTION OF REMEDIES.

1. MASTER AND SERVANT (98)—ASSUMPTION OF RISKS—KNOWLEDGE—MAKING PLACE SAFE. In such a case, the rule that a servant assumes the risk of working in a place which he was engaged in making safe has no application, since his work had nothing to do with making the place safe. *Rustan v. Southern Alaska Canning Co.* 350

Master and Servant—Continued.

2. MASTER AND SERVANT (98, 110, 161, 163)—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—SAFE PLACE—QUESTION FOR JURY. It cannot be said as a matter of law, that a riveter at work on a vessel requiring rapidity and constant attention, was guilty of contributory negligence or assumed the risk, where he fell from a scaffold, which was one plank narrower than customary, and which, at the point in question, was pushed under the deck some five or six inches; but the question is for the jury. *Belkin v. Skinner & Eddy Corporation* 80

3. MASTER AND SERVANT (104-1)—NEGLIGENCE (26)—STATUTORY PROVISIONS—COMPARATIVE NEGLIGENCE—RELATIVE DEGREES—DAMAGES. In an action by a servant for personal injuries based on the comparative negligence statute of Alaska, it is error to instruct that, if the negligence of the plaintiff was gross and the proximate cause of the accident, he could not recover; and to refuse defendant's request to instruct that, if both parties were negligent and the plaintiff's negligence slight and defendant's gross, then the actual damages should be reduced in proportion to the amount of negligence chargeable to the plaintiff. *Rustan v. Southern Alaska Canning Co*..... 350

4. MASTER AND SERVANT (110)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECTS. A longshoreman, injured by the fall of ties when a top-heavy tackle load was received in the hold of a ship, is guilty of contributory negligence, where he observed the danger and unnecessarily assumed a dangerous position to release the tackle. *Peterson v. Dawson & Co*..... 505

5. MASTER AND SERVANT (111)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DUTY TO DISCOVER DEFECTS. A ship carpenter engaged in enlarging a hole in a roof is not guilty of contributory negligence, as a matter of law, in choosing the more direct way to his work and in stepping into a tank of hot water, where the top of the tank, which had been covered with boards, was one of the steps up, a board had been removed, the light was poor, and the tank was filled with hot water for the first time, all without his knowledge, where it appears that the other route to the roof was still more dangerous. *Rustan v. Southern Alaska Canning Co*..... 350

6. MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION—CLASSIFICATION OF INJURIES — AWARD—JURISDICTION — REVIEW — STATUTES. The superior court has no original jurisdiction to determine the classification of injuries received by one who is entitled to compensation under the workmen's compensation act, its province in such matters being to pass upon appeals from final decisions of the commission. *Maddox v. Industrial Insurance Commission*..... 21

7. SAME (121-2)—DECISION OF DEPARTMENT—APPEAL—EFFECT OF DISMISSAL WITH PREJUDICE. A judgment dismissing an action "with

Master and Servant—Continued.

prejudice" wherein the original jurisdiction of the superior court had been improperly invoked in a case under the workmen's compensation act, when the question was properly one in the first instance for the industrial insurance commission, was not erroneous, since it did not foreclose a hearing before the commission nor preclude a rehearing before the court on appeal from the commission's decision. *Maddox v. Industrial Insurance Commission*..... 21

8. MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—REMEDIES OF WORKMAN—"DELIBERATE INTENT"—STATUTES. Under Rem. Code, § 6604 [Rem. Comp. Stat., § 7798] allowing a servant, compensated under the workmen's compensation act, to maintain an action against the master if the injury resulted from "deliberate intention" of the master to produce the injury, there must be a specific intent, not merely carelessness or negligent use of an agency after knowledge on the part of the master that it was dangerous and unsafe. *Delthony v. Standard Furniture Co*..... 298

9. MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION—ORDERS OF COMMISSION—REVIEW. The courts cannot review an order of the industrial insurance commission on the facts of the classification, determining the amount of the award, where it was not capricious or arbitrary or based upon a misconstruction of the statutes. *Krause v. Industrial Insurance Commission*..... 662

10. SAME (170)—INSTRUCTIONS—ASSUMPTION OF RISKS. An instruction that to charge a servant with assumption of risks, it must appear that he knew and appreciated the danger is erroneous in not also charging him with assuming the risk and danger which, in the exercise of reasonable care, he should have known and appreciated. *Belkin v. Skinner & Eddy Corporation*..... 80

Meander Lines:

As boundary in government patent, see PUBLIC LANDS.

Measure of Damages:

In general, see DAMAGES, 1-4.

Mechanics' Liens:

1. MECHANICS' LIENS (32)—RIGHT TO LIEN—CONTRACTORS—SERVICES OF WORKMAN—MACHINES. A lien may be claimed by one who furnished to the contractors a sanding machine and a man to operate it under a contract to pay $2.50 an hour for the machine and man. *Ellis-Mylroie Lumber Co. v. Bratt*..... 142

2. SAME (34)—RIGHT TO LIEN—MODIFICATION OF CONTRACT—EXTRAS. Contractors are not entitled to a lien of ten per cent upon extra work performed on written orders, under a contract allowing same in case of extras furnished under an emergency, where there was no

Mechanics' Liens—Continued.

emergency, but the extras were furnished under a clause providing for a written notice and prior agreement as to the price of the extras; there having been no waiver of the terms of the contract. *Ellis-Mylroie Lumber Co. v. Bratt*..... 142

3. MECHANICS' LIENS (40-1)—PROCEEDINGS TO PERFECT—NOTICE TO OWNER. A materialman's notice of intention to the "owner" of the premises is sufficient where it was addressed to and received by Dr. W. as an individual who was president of, and had the general management of the owner, a corporation, and the building permit had been issued in his name. *Ellis-Mylroie Lumber Co. v. Bratt.* 142

4. SAME (40-1)—PROCEEDINGS TO PERFECT—NOTICE TO OWNER. A notice of intention to claim a lien, addressed to the president of the owner in care of the architect for the building, and by him received and delivered to the president, is sufficient. *Ellis-Mylroie Lumber Co. v. Bratt*..... 142

5. SAME (45, 47)—CLAIM OF LIEN—OWNERSHIP OF PROPERTY. A materialman's claim of lien sufficiently states the name of the owner or reputed owner, although it includes as owners two persons who have no interest in the property. *Ellis-Mylroie Lumber Co. v. Bratt* 142

6. SAME (45, 54)—CLAIM OF LIEN—DESIGNATION OF CONTRACTOR. A materialman's claim of lien sufficiently designates the person to whom the material was furnished although it gives the name of but one of the three contractors. *Ellis-Mylroie Lumber Co. v. Bratt* 142

7. SAME (55)—NOTICE—TERMS OF CONTRACT. There is no merit in an objection to a lien notice because of no evidence of the terms of a subcontract, where the notice followed the requirements of the statute with the additional clause that one B. was a subcontractor, and the architect testified that the materials were furnished by the claimant. *Ellis-Mylroie Lumber Co. v. Bratt*..... 142

8. SAME (65)—CLAIM OF LIEN—AMENDMENT. Where a contractor had been doing business in the name of a construction company, a notice of intention to claim a lien for materials furnished at the request of such company may be amended at the trial to show that it was at the request of the contractor; the rule of liberal construction applying to notice of intention as well as to the notice of lien. *Ellis-Mylroie Lumber Co. v. Bratt*..... 142

9. MECHANICS' LIENS (71)—PRIORITY—MORTGAGES. A mortgage given to a contractor for the price of a house to be built on the premises has priority over claims for liens for materials furnished to the contractor after the recording of the mortgage, as provided

Mechanics' Liens—Continued.

by Rem. Code, § 1132, even though the mortgage was assigned and the assignment was not recorded as required by Id., § 8781 [Rem. Comp. Stat., § 10596]. *Miller v. Fryberg* 243

10. MECHANICS' LIENS (71)—MORTGAGES (89)—PRIORITY—ASSIGNMENT OF MORTGAGE—RECORDING. Notwithstanding Rem. Code, § 8781, requiring assignments of mortgages to be recorded, the failure to record the assignment of a mortgage, given to a contractor for the price of a building to be constructed on the premises in consideration of which the contractor agreed to pay all labor and material liens, does not subordinate the mortgage to a materialman's lien for material furnished to the contractor upon his false representations that he was still the owner of the mortgage and would pay for the material out of the proceeds of the mortgage. *Miller v. Fryberg* 243

Meetings:

Of stockholders, see CORPORATIONS, 1.

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF, 1, 2.

Mental Anguish:

As element of damages, see DAMAGES, 5.

Misconduct:

Of counsel or party ground for new trial, see NEW TRIAL, 1.
Of jurors ground for new trial, see NEW TRIAL, 2, 5.
Of counsel, see TRIAL, 2.

Misrepresentation:

See FRAUD.

Modification:

Of contract of sale, see SALES, 1.

Money:

Embezzlement, see EMBEZZLEMENT.
Commingled funds as community property, see HUSBAND AND WIFE, 3.

Money Received:

Recovery of price paid for land, see VENDOR AND PURCHASER, 2.

Moot Questions:

Review on appeal, see APPEAL AND ERROR, 3, 4.

Mortgages:

Of personal property, see CHATTEL MORTGAGES.

Priority as between mortgage and mechanics' lien, see MECHANICS' LIENS, 9, 10.

1. MORTGAGES (22) — EVIDENCE (164) — ADMISSIBILITY — PAROL TO VARY WRITING—COLLATERAL AGREEMENT. Where an absolute deed, intended as a mortgage, was accompanied by a written collateral agreement which was incomplete in that it failed to make any provision for the disposition of the property at the end of the two years it was to run in case neither of the parties had made sales, oral evidence of the agreement of the parties is admissible to show that the transaction was intended as a mortgage. *Smith v. Crawford* 580

2. SAME (106)—TRANSFER OF PART OF PREMISES—SALE IN INVERSE ORDER OF ALIENATION. Where portions of mortgaged premises are conveyed by the mortgagor, the foreclosure should provide for sale in the inverse order of alienation; and a purchaser taking title in ignorance of a prior unrecorded deed to another has the superior equity. *Bode v. Rhodes* 98

3. MORTGAGES (157) — FORECLOSURE — LIMITATIONS — TRANSFER OF PROPERTY. As long as the legal title remains in the mortgagor the mortgagee may safely deal with the mortgagor, and subsequent purchasers from the mortgagor who failed to record their deed cannot allege that payments to the mortgagee did not toll the statute of limitations. *Bode v. Rhodes* 98

Motions:

To dismiss appeal, see APPEAL AND ERROR, 13.

Judgment on pleadings, see PLEADING, 7.

Motor Vehicles:

Regulation of carriers by department of public works, see CARRIERS, 1-3.

Motor vehicle insurance, authority to write, see INSURANCE, 1, 2.

Municipal Corporations:

Regulation of use of streets, see CARRIERS, 3.

Drainage districts within limits of city, see DRAINS, 1.

Injunction against destruction of building in fire limits, see INJUNCTION.

Laws relating to elections and term of office, see OFFICERS.

Collision of street cars with persons or vehicles on track, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS (66) — EMPLOYEES — REMOVAL — CIVIL SERVICE RULE—REVIEW. Where a discharged city employee in civil service fails to demand an investigation by the civil service commis-

Municipal Corporations—Continued.

sion within ten days, as required by the city charter, the courts cannot inquire into the discharge or order his reinstatement. *State ex rel. Lennon v. Kellogg*..... 584

2. MUNICIPAL CORPORATIONS (379)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS—NEGLIGENCE. Defendant's negligence in an automobile collision at a street intersection is established by his testimony showing that plaintiff's car had the right of way as the car on the right simultaneously reaching the intersection, and that the collision occurred without either driver slackening his speed or changing his course. *Romano v. Dulmage Motor Co*..... 347

3. MUNICIPAL CORPORATIONS (379, 383)—USE OF STREETS—MUTUAL RIGHTS AT INTERSECTIONS—CONTRIBUTORY NEGLIGENCE. The driver of a truck first entering a street intersection, and colliding with a Ford, is nevertheless guilty of contributory negligence, where he saw the Ford approaching from the right, at a high rate of speed, in time to have stopped, but veered to the left without slackening his speed, and there would have been no collision if he had either stopped or continued his course across the street; the right of way not being absolute but relative. *Oliver v. Taylor*..... 190

4. MUNICIPAL CORPORATIONS (379, 383, 392)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Under an ordinance giving the right of way to vehicles on the right in the case of simultaneous approach to a street intersection, it is not error to instruct that a vehicle on the right, which admittedly was first to reach the intersection, would have the right of way; and it was not error to refuse an instruction that such driver would be guilty of contributory negligence precluding a recovery if on the wrong side of the street, where it omitted the element that such fact must have contributed to the accident. *Hullin v. Seattle Taxicab Co*..... 311

5. MUNICIPAL CORPORATIONS (379, 390)—USE OF STREETS—MUTUAL RIGHTS AT CROSSINGS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the defendant and the contributory negligence of plaintiff in a collision of automobiles at a street intersection, are for the jury, where it appears that plaintiff's stage had the right of way as the car first entering the intersection, and defendant's car was traveling at excessive speed, while the stage driver was going slower, and looked to the left before entering the intersection. *Henslin v. Pratt*..... 443

6. MUNICIPAL CORPORATIONS (380)—USE OF STREETS—ORDINANCES. An ordinance providing that no person shall operate a vehicle in any other than a careful and prudent manner, . . . nor so as to collide with another vehicle, when considered as a whole, is reasonable and not void for uncertainty. *Estes v. Babcock*..... 270

Municipal Corporations—Continued.

7. MUNICIPAL CORPORATIONS (380, 384)—USE OF STREETS—ACCIDENT AT CROSSINGS—VIOLATION OF ORDINANCE—PROXIMATE CAUSE. Where the proximate cause of a collision between a taxicab and an auto truck was the negligence of the taxicab driver, the owner of the truck is entitled to recover for damages sustained, though the truck was driven by a son less than eighteen years of age for whom no permit had been obtained as required by city ordinance. *White v. Kline* 45

8. MUNICIPAL CORPORATIONS (380, 388)—USE OF STREETS—ORDINANCES—EVIDENCE. It is not error to admit an ordinance relative to the duty of automobile drivers simultaneously reaching street intersections, where the speed of one further away was such as to constitute simultaneous approach. *Oliver v. Taylor*..... 190

9. SAME (380, 392)—USE OF STREETS—ORDINANCES—CROSSINGS—INSTRUCTIONS. In an action by a pedestrian, struck by an automobile when about to board a street car stopping near a crossing, it is proper to instruct that a traffic ordinance as to the right of way "at any crossing," does not mean the exact mathematical lines of the street, but means close proximity to the line where a prudent person would have a right to be when proceeding to step upon a street car at the crossing. *Goninon v. Lee*..... 471

10. MUNICIPAL CORPORATIONS (381, 392)—USE OF STREETS—RATE OF SPEED—INSTRUCTIONS. Error cannot be predicated upon an instruction as to negligence in case the maximum speed was exceeded, where there was evidence from which the jury could reasonably conclude that the limit was being exceeded. *Goninon v. Lee*.... 471

11. MUNICIPAL CORPORATIONS (386) — USE OF STREETS — PLEADING—AUTO IN CHARGE OF DRUNKEN DRIVER. A complaint against the owner of an automobile for damages caused by a drunken driver of the car states a cause of action where it alleges that the owner permitted the driver to take out the car knowing that he had a quart of whiskey, was going on a spree, and in the habit of getting drunk and liable to injure others while driving in that condition. *Mitchell v. Churches* 547

12. SAME (389) — USE OF STREETS — INSUFFICIENCY OF EVIDENCE—DRUNKEN DRIVER. In such a case, there is sufficient evidence to go to the jury on the question of the owner's liability, where it appears that the owner admitted that the driver and his companion were in the habit of taking the car out for parties after work, and that they could not have been very intoxicated because they had only one quart of whiskey with them and were good drinking men. *Mitchell v. Churches* 547

13. SAME (392)—USE OF STREETS—LIABILITY FOR ACTS OF DRUNKEN DRIVER—INSTRUCTIONS. In such a case, it is proper to instruct that

Municipal Corporations—Continued.

the owner would be liable for damages for which the driver would be liable, if he loaned him the car knowing that he was liable to become intoxicated, under such circumstances as would produce in the mind of a reasonable man reasonable grounds for belief that he might become intoxicated. *Mitchell v. Churches*..... 547

14. MUNICIPAL CORPORATIONS (443, 469)—STREETS — OBSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED. It cannot be said that an auto driver was guilty of contributory negligence, as a matter of law, in driving in the night-time between two red lights thirty feet apart, on the principal thoroughfare of a large city, and striking the end of a derrick pole extending from a truck parked at the curb for unloading where a building was under construction, it appearing that he did not see the pole, which was unlighted and extended to the center of the street four feet above the surface. *Crooks v. Rust*..... 154

15. MUNICIPAL CORPORATIONS (479)—TORTS—DEFECTS IN WATER PIPES —ACTIONS—CONTRIBUTORY NEGLIGENCE. In an action against a city for damages for flooding a basement through the breaking of a water main, the fact that plaintiffs occupied the basement without providing drains as required by an ordinance, would not constitute contributory negligence, precluding a recovery, unless it appears that the want of such drains contributed to the injury. *Kotkins v. Seattle* 590

16. SAME (479)—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for damages for flooding a basement, provided with a siphon in place of the drains required by ordinance, it is incompetent to show that an administrative officer issued a license to the plaintiff to use such siphon, in violation of the ordinance, as the defense of contributory negligence might thereby be taken out of the case. *Kotkins v. Seattle* 590

17. MUNICIPAL CORPORATIONS (482, 484)—INDEBTEDNESS—POWERS—CORPORATE PURPOSES—CONSTRUCTION OF ARMORY—CONSTITUTIONAL AND STATUTORY PROVISIONS. Rem. Code, § 3831-5, authorizing cities to expend money for payment in whole or in part for an armory site is not violative of Const., art. 1, § 6, prohibiting indebtedness for other than strictly a municipal purpose; since a state armory constitutes a local benefit, under Rem. Code, § 7183, which authorizes the calling out of the National Guard in the event of insurrection, rebellion, invasion, tumult, riot, resistance to law or process or breach of the peace occurring in the vicinity of any station of such organization. [See Rem. Comp. Stat., §§ 3996, 8469.] *State ex rel. Thompson v. Burch*..... 1

18. SAME (482, 484). Where a city makes an appropriation for an armory building under legislative authority, it is exercising functions conferred by law, and its action is equivalent to the performance of

Municipal Corporations—Continued.

a mandatory duty required by the legislature. *State ex rel. Thompson v. Burch*..... 1

19. MUNICIPAL CORPORATIONS (490)—PUBLIC DEBT—SUBMISSION OF TO VOTE—OPERATIONS OF STREET RAILWAY. A city operating a street railway at a loss, cannot, without submitting the question to the voters, use its general funds in the operation of the road, where the road was acquired under Rem. Comp. Stat., §§ 8488, 8489, 8491, which authorized the city to acquire and operate the street railway through revenue derived from a special fund without incurring any general indebtedness, which was prohibited unless authorized by the voters. *Asia v. Seattle*..... 674

Murder:

See HOMICIDE.

Navigable Waters:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

1. NAVIGABLE WATERS (1)—LAKES—WHAT CONSTITUTES. A small lake covering forty acres, from ten to fifty feet deep at any point fifty feet from the shore, is a navigable lake, although it has never been used for navigation. *Ortel v. Stone*..... 500

Necessity:

For condemnation for public use, see EMINENT DOMAIN, 1, 2, 4.

Negligence:

Of carrier as question for jury, see CARRIERS, 6.
Inadequate and excessive damages, see DAMAGES, 2, 3.
Defects or obstructions in highways, see HIGHWAYS.
Of landlord in blasting on leased premises, see LANDLORD AND TENANT, 3, 4.
Of employers, see MASTER AND SERVANT.
Causing injuries to persons on city streets, see MUNICIPAL CORPORATIONS, 2-14.
Injuries from defects in streets, see MUNICIPAL CORPORATIONS, 14.
Liability of cities for torts, see MUNICIPAL CORPORATIONS, 15, 16.
Ratification of acts of agent, see PRINCIPAL AND AGENT, 2.
In operation of street railroads, see STREET RAILROADS.

1. NEGLIGENCE (3)—FIRES—EVIDENCE. There is sufficient evidence that defendant's negligence caused an explosion and fire in a garage, where it appears that he was trying an experiment in heating the place by connecting a preheating torch with a stove in an effort to burn oil. *Jordan v. Rieker*..... 513

Negotiable Instruments:

See BILLS AND NOTES.

Newly Discovered Evidence:

As ground for new trial, see NEW TRIAL, 4.

New Parties:

See PARTIES.

New Trial:

Review of ruling on motion, see APPEAL AND ERROR, 15.
In criminal prosecutions, see CRIMINAL LAW, 14-16.

1. NEW TRIAL (11)—GROUNDS—ARGUMENT OF COUNSEL. In an action against a city for personal injuries sustained in a collision with a city street car, it is not an abuse of discretion to refuse a new trial on the ground of improper argument to the effect that the city general fund would not be liable for any recovery by plaintiff, where the city did not ask for any instruction to the jury to disregard the remarks, and the court made it clear that parties suggested as liable were not interested in the case. *Plastino v. Seattle*..... 195

2. NEW TRIAL (16)—GROUNDS—MISCONDUCT OF JURY—MANNER OF ARRIVING AT VERDICT. A new trial on the ground of misconduct in a quotient verdict is properly denied where the jurors made oath that there was no agreement to abide by the quotient, and it appears that the verdict rendered was not a quotient of the sums each juror voted for. *Oliver v. Taylor*..... 190

3. NEW TRIAL (25)—GROUNDS—EXCESSIVE DAMAGES. It is not an abuse of discretion for the trial court to deny a motion for new trial based on excessive damages due to passion and prejudice in an action for damages to buildings and business by blasting stumps, where the jury returned a verdict of $700 and the evidence would justify a larger verdict on the basis of loss of profits alone. *Alexis v. Pittinger* 626

4. NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE. It is not an abuse of discretion to refuse a new trial in filiation proceedings on the ground of newly discovered evidence that the prosecutrix had given the name of another man as father of the child, where it is shown that this was done to shield the defendant. *State v. White* 512

5. NEW TRIAL (49)—MISCONDUCT OF JURORS—IMPEACHMENT—MATTERS INHERING IN VERDICT. The verdict of a jury cannot be impeached on motion for a new trial by affidavits of the jurors showing that they disagreed and were mistaken as to the testimony given by a certain witness in the case; since the fact inhered in the verdict. *Henslin v. Pratt* 443

New Trial—Continued.

6. NEW TRIAL (56-1)—PROCEEDINGS—ORDER GRANTING NEW TRIAL. An order granting a new trial "for errors occurring in the trial of said cause," is not to be limited merely to that provision of Rem. Code, § 399, authorizing a new trial for "error in law occurring at the trial," where other grounds were assigned under other subdivisions of that section of the code. *Moilanen v. Blake Furniture Co.* 25

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

To appear for arraignment, see BAIL, 2.
Of mortgage, see CHATTEL MORTGAGES, 1, 3, 4.
Judicial notice, see EVIDENCE, 1.
To quit possession of premises, see FORCIBLE ENTRY AND DETAINER, 2.
Defects or obstruction in highways, see HIGHWAYS, 2.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 1, 4, 5, 10.
Of lien claim, see MECHANICS' LIENS, 3-8.
To owner, see NUISANCE, 1, 3.

Nuisance:

1. NUISANCE (30)—JURISDICTION—NOTICE. It is not a prerequisite to a criminal prosecution for a nuisance that notice was given to the owner. *Seattle v. Curtis* 229
2. NUISANCE (31-1)—PROSECUTION—ISSUES AND VARIANCE. In the absence of objection to the complaint, it is not error to admit evidence of the condition of particular portions of the premises, although not set out in the complaint. *Seattle v. Curtis* 229
3. SAME (32)—EVIDENCE. In a prosecution for a nuisance by tenants of the defendant, notice to the owner is sufficiently shown by oral notice and knowledge of the posting of written notice. *Seattle v. Curtis* 229

Objections:

Review as dependent on objection made on trial, see APPEAL AND ERROR, 5.

Obstructions:

Of streets, see MUNICIPAL CORPORATIONS, 14.

Officers:

Authority to arrest without warrant, see ARREST.
Unlawful loan of funds to, see BANKS AND BANKING.
Misconduct of officer in charge of jury as ground for new trial, see CRIMINAL LAW, 15.

Officers—Continued.

Prosecuting attorneys, see DISTRICT AND PROSECUTING ATTORNEYS.
Health officers, see HEALTH.
Receivers, see RECEIVERS.
School officers, see SCHOOLS AND SCHOOL DISTRICTS.
State officers, see STATES.

1. OFFICERS (19)—TERM—CHANGE. Under the rule that a statute should not unnecessarily be construed to shorten a term of office, Laws 1921, p. 179, § 2 and p. 180, § 4 [Rem. Comp. Stat., §§ 5144, 5146], changing the time for holding certain municipal elections, and providing for a different time for the beginning and ending of the terms, the incumbents at the time of the taking effect of the act hold to the end of the term for which they were elected, and until the time fixed for the commencement of the term of a successor; and the act was not intended to disturb the rotation of officers theretofore elected at different times. *State ex rel. Pendleton v. Superior Court* 73
2. SAME (19, 20)—TERM—CHANGE—HOLDING OVER. Laws 1921, p. 179, § 2 and p. 180, § 4 [Rem. Comp. Stat., §§ 5144, 5146], changing the time for holding certain municipal elections and providing a later time for the beginning of the terms, whereby incumbents hold over, does not violate Const., art. XI, § 8, prohibiting the extension of the term of an officer beyond the term for which he was elected, where it appears that all such incumbents were elected for a named period of time "and until their successors are elected and qualified." *State ex rel. Pendleton v. Superior Court* 73

Open and Close:

Parties entitled, see TRIAL, 1.

Opinion Evidence:

In civil actions, see EVIDENCE, 7, 8.

Optometry:

See PHYSICIANS AND SURGEONS, 2, 3.

Oral Contracts:

See FRAUDS, STATUTE OF.

Oral Evidence:

See EVIDENCE, 5.
To show character of deed as mortgage, see MORTGAGES, 1.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 2.
Review of by state in criminal case, see CERTIORARI, 2, 3.
Of industrial insurance department, see MASTER AND SERVANT, 6, 7, 9.
Granting new trial, see NEW TRIAL, 6.

Ordinances:

Municipal ordinances, relating to use of streets, see MUNICIPAL CORPORATIONS, 6-9.

Osteopaths:

See PHYSICIANS AND SURGEONS, 2, 3.

Ownership:

Notice to owner of intention to claim lien, see MECHANICS' LIENS, 3-5.

Pardons:

Act authorizing court to suspend sentence as encroachment on executive power, see CONSTITUTIONAL LAW, 4.

Parent and Child:

Liability of divorced husband for support of child placed in private asylum by mother, see INSANE PERSONS.

Parol Agreements:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

Parole:

Of prisoner on suspended sentence, see CRIMINAL LAW, 17-19.

Parol Evidence:

See EVIDENCE, 5.
To show character of deed as mortgage, see MORTGAGES, 1.

Partial Invalidity:

Effect of partial invalidity of statutes, see STATUTES, 1.

Particulars:

Bill of, see DISCOVERY.

Parties:

Persons entitled to appeal, see APPEAL AND ERROR, 3, 4.
Rights and liabilities as to costs, see COSTS.
In proceedings supplementary to execution, see EXECUTION.
Persons concluded by judgment, see JUDGMENT, 4.
In suit to quiet title, see QUIETING TITLE.
Residence of co-defendants as affecting venue, see VENUE.

1. PARTIES (42-1)—PLEADINGS (110)—AMENDMENT BRINGING IN NEW PARTIES. In an action for breach of covenant, it is not error to allow a trial amendment bringing in the wives of the defendants, where there was no prejudice and no surprise claimed or continuance asked. *Miller v. Smith* 163

Partition:

Between co-tenants, see TENANCY IN COMMON, 1.

Partnership:

Right to trial by jury in action involving accounting, see JURY.
Issues and proof under general denial in action for accounting, see PLEADING, 9.

1. PARTNERSHIP (23-32) — MUTUAL RIGHTS — LIABILITY ON NOTE TO PARTNER. A partner executing, as co-maker, a partnership note to his co-partner for the purpose of borrowing money for the use of the partnership (of three members) is liable as a co-maker for the whole sum, and it is error to confine his liability to one-third thereof. *McDonald v. McDonald* 396

2. PARTNERSHIP (23, 96)—ACCOUNTING—CHARGES AND CREDITS—INTEREST ON ADVANCES—RESULT. It is not error to refuse to allow interest on advances made by the partners, upon striking the partnership account, where excess initial advancements by one partner would be offset by his excess withdrawals and it is not shown that the interest due one would materially exceed that due the other. *McDonald v. McDonald* 396

3. PARTNERSHIP (55) — ACTIONS — CAPACITY TO SUE — CONDITIONS PRECEDENT—STATUTES. Rem. Code, §§ 8369-8373, requiring the filing of a partnership statement, as a condition precedent to maintaining an action, relates only to the capacity to sue, and may be complied with by the filing of a statement after the partnership had ceased to do business as a going concern. *Peterson v. Morris* 335

Passengers:

Injury to passenger in taxicab, see CARRIERS, 6, 7.

Patents:

Boundaries in government patents, see PUBLIC LANDS.

Payment:

See BILLS AND NOTES, 2.
Mandamus to compel payment of claim against county, see MANDAMUS.
Of agent for principal, see PRINCIPAL AND AGENT, 3, 4.

Performance:

Or breach of contract, see CONTRACTS, 4-8.
Affecting operation of statute of frauds, see FRAUDS, STATUTE OF, 2-4.

Personal Injuries:

To passenger, see CARRIERS, 6, 7.
Inadequate and excessive damages, see DAMAGES, 2, 3.

Personal Injuries—Continued.

Filing claim under workmen's compensation act as election of remedy, see ELECTION OF REMEDIES.
From defects in road, see HIGHWAYS.
To employee or third person, see MASTER AND SERVANT.
To person in city street, see MUNICIPAL CORPORATIONS, 2-14.
To persons on or near street railroad tracks, see STREET RAILROADS.

Personal Property:

Limitation of action for damages to, see LIMITATION OF ACTIONS.

Petition:

For review on certiorari, see EMINENT DOMAIN, 5.

Physicians and Surgeons:

Opinion evidence by, see EVIDENCE, 7.

1. PHYSICIANS AND SURGEONS (2)—LICENSE TO PRACTICE—DENTISTS—STATUTES. The dental practice act, Rem. Code, § 8412 *et seq.*, is constitutional. *Noble v. Dibble* 509

2. PHYSICIANS AND SURGEONS (4-1, 5)—REGISTRATION OR LICENSE—STATUTES—"OSTEOPATHS"—OPTOMETRY. Section 15 of the Optometry Act [Rem. Comp. Stat., § 10159] excepting from its operation "any regularly licensed occulist or physician who is regularly licensed to practice medicine," has no application to osteopathic practitioners, who, under the history of the legislature of the state are not regularly licensed to practice medicine. *State v. Rust* 480

3. SAME (4-1, 5). The practice of osteopathy does not include the practice of optometry, although an osteopath may treat the eye osteopathically. *State v. Rust* 480

4. PHYSICIANS AND SURGEONS (10-1, 11)—MALPRACTICE—EVIDENCE—SUFFICIENCY. It is error to grant a nonsuit in an action for malpractice in failing to properly reduce a simple fracture of the radius of the right arm, where it appeared there was no misuse of the arm during the treatment, and that at the time of the discharge the arm was crooked and shortened, there was a visible lump, constant pain and loss of flexion and a second operation was necessary to make the arm even passably usable. *Cornwell v. Sleicher* 573

Place:

Of recording chattel mortgage, see CHATTEL MORTGAGES, 2.
Residence of parties to action as affecting venue, see VENUE.

Pleading:

Form of action, abolishment of distinctions, see ACTION, 1.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 19.

Pleading—Continued.

Complaint in action against county for services, see COUNTIES.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

Demurrer to information, effect of order sustaining, see INDICTMENT AND INFORMATION, 3.

Complaint against owner of auto for damages caused by drunken driver, see MUNICIPAL CORPORATIONS, 11.

Bringing in new parties, see PARTIES.

1. PLEADING (43)—ANSWER—INCONSISTENT DEFENSES—JOINDER WITH GENERAL DENIAL. Assuming, in an action on a promissory note, that the defenses of *non est factum* and the statute of limitations are inconsistent, the defendant would not thereby be cut off from all defense, under a general denial, of matters which he cannot be deemed to have admitted. *Spahr v. Liebeck* 53

2. PLEADING (74)—REPLY—DEPARTURE—NEW MATTER—CONSISTENCY. In an action on a county bridge contract for damages for refusal to allow the contractor to complete the work, in which the county alleged failure to complete the contract within the time limit, it is not a material variance for plaintiff to reply that he was delayed and unable to finish the work within the time limited because of inability to obtain cement and because of high waters. *Davis v. Thurston County* 414

3. PLEADING (87)—DEMURRER—PLEADING GOOD IN PART. Upon overruling plaintiff's demurrer to a defense based on the ground that it did not state sufficient facts, it is error to dismiss the action, where the answer was not a complete, but only a partial, defense. *Peterson v. Morris* 335

4. PLEADINGS (104)—AMENDMENT — NECESSITY — QUANTUM MERUIT. An action for stated rent cannot be sustained upon the theory of quantum meruit where there was no amendment and no proof thereof offered. *Rude v. Coulter Tow Boat Co.* 60

5. PLEADINGS (104)—AMENDMENTS—TO CONFORM TO PROOF. Damages in excess of the amount claimed may be allowed under an amendment to conform to the proof, where evidence thereof was received without objection. *Miller v. Smith* 163

6. PLEADING (104)—AMENDMENTS—TO CONFORM TO PROOF. Where the evidence on a third cause of action for money loaned to a partner showed that the money was loaned to the firm and used by it, the court may treat defendant's answer admitting the loan to him as an inadvertence. *McDonald v. McDonald* 396

7. PLEADINGS (145) — MOTIONS — JUDGMENT ON PLEADINGS — EFFECT. Plaintiff's motion for judgment on the pleadings admits not only the allegations of the adversary, notwithstanding a reply denying

Pleading—Continued.

the same, but also admits the untruth of his own allegations that had been denied. *Deaver v. Patterson* 375

8. SAME (174)—ISSUES—GENERAL DENIAL. In an action on a promissory note alleged to have been given in payment of interest on a prior note, which allegation was specifically denied, it was admissible, under the general denial, to prove that the money for which the note was given was for a loan which the maker obtained to pay indebtedness to another party. *Spahr v. Liebeck* 53

9. PLEADINGS (174)—ISSUES—GENERAL DENIAL. In an action for a partnership accounting, under a general denial defendant may show that alleged moneys and goods furnished or forwarded were fully settled for or never furnished as claimed by plaintiff. *Levy v. Simon* 179

Pledges:

Garnishment of property pledged, see GARNISHMENT, 2.

Police Power:

Of city, see CARRIERS, 3.

Policy:

Of insurance, see INSURANCE.

Poll Tax:

See TAXATION, 1-3.
Effect of partial invalidity of act, see STATUTES, 1.

Possession:

See ADVERSE POSSESSION.
Affecting operation of statute of frauds, see FRAUDS, STATUTE OF, 2-4.
Illegal possession of liquor, see INTOXICATING LIQUORS.
Of demised premises, see LANDLORD AND TENANT, 3, 4, 6.
Of property by receiver, see RECEIVERS.

Powers:

Of department of public works, see CARRIERS, 1-3; GAS.
Legislative powers, see CONSTITUTIONAL LAW, 2, 3.
Executive powers, see CONSTITUTIONAL LAW, 4.
Of state board of health, see HEALTH, 1.
Of court on sustaining demurrer to information, see INDICTMENT AND INFORMATION, 3.
Of city to expend money for armory building, see MUNICIPAL CORPORATIONS, 17, 18.
Of agent to collect debts, see PRINCIPAL AND AGENT, 3, 4.
Of adjutant general to build addition to armory, see STATES.

Practice:

See APPEAL AND ERROR; CERTIORARI; COSTS; CRIMINAL LAW; INJUNCTION; NEW TRIAL; PARTIES; PLEADING.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 19-22.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 23, 25.

Presentment:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Presumptions:

As to separate or community nature of property, see HUSBAND AND WIFE, 3, 4.

Principal and Agent:

See BROKERS.
Corporate agents, removal of, see CORPORATIONS, 2.
Ratification of defective delivery of deed by agent, see DEEDS.
Embezzlement by agent, see EMBEZZLEMENT.

1. PRINCIPAL AND AGENT (9)—EVIDENCE OF AGENCY—SUFFICIENCY. An agreement of a box company to furnish a marketing company with a quantity of fruit boxes, over and above the written contract between them for boxes, constitutes a contract of sale and not one of agency. *Leavenworth State Bank v. Wenatchee Northern Warehouse & Marketing Co.* 39

2. PRINCIPAL AND AGENT (19, 21)—MUTUAL RIGHTS AND LIABILITIES—ESTOPPEL—NEGLIGENCE OF AGENT—RATIFICATION—WAIVER OF CLAIM AGAINST AGENT. There is an implied ratification by the principal of the acts of his agent in purchasing furs contrary to instructions when the principal himself takes control of the furs and disposes of them in a distant market; and any claim against the agent for loss sustained in the transaction is waived by the principal's failure, until a suit is started against him for the recovery of unpaid salary, to advise his agent that the furs had been sold at a loss or that he had any intention of holding the agent responsible for such loss. *Cohen v. Robinson* 392

3. PRINCIPAL AND AGENT (35)—POWERS OF AGENT—AUTHORITY TO COLLECT. A loan agent is shown to be the agent of the borrower, with authority to collect principal as well as interest of a mortgage in which it was mortgagee, although it did not have possession of the mortgage note, where its practice was to make loans in its own name, indorse them to its customers, collect and remit interest, and

Principle and Agent—Continued.

the borrower was familiar with the practice, took a note without recording any assignment and had no dealings with the mortgagor, until after the agent had collected part of the principal and become insolvent. *Kraus v. Dowell*..... 90

4. Principal and Agent (35)—Authority—Collection of Debts. Findings that a note and mortgage were paid in full to the holder's authorized agent are sustained, where it appears that for four years the holder had allowed the agent who negotiated the loan to collect interest and payments, without notice to the maker that he was not authorized to receive it, notwithstanding the agent appropriated and failed to account for the last payment after giving a receipt in full. *Masterson v. Haislett* 650

Principal and Surety:

Liability of surety on attachment bond, for wrongful issuance of garnishment, see Garnishment, 1.

Motor vehicle bonds, authority of company to write, see Insurance, 1, 2.

Priorities:

In condemnation proceedings, see Eminent Domain, 2.

Of mechanics' liens, see Mechanics' Liens, 9, 10.

In appropriation of waters, see Waters and Water Courses, 2, 3.

Private Ways:

Condemnation for, see Eminent Domain, 4.

Privilege:

See Witnesses, 4, 5.

Privity:

As affecting bar of judgment, see Judgment, 4.

Process:

Service on agent of foreign corporations, see Corporations, 3.

Profits:

Damages for loss of, see Damages, 4.

Character as community or separate property, see Husband and Wife, 3.

Promissory Notes:

See Bills and Notes.

Proof:

Amendment to conform to proof, see Pleading, 5, 6.

Issues and proof under general denial, see Pleading, 8, 9.

Property:

Taking for public use, see EMINENT DOMAIN.
Subject to garnishment, see GARNISHMENT, 2.
Protection of rights of property by injunction, see INJUNCTION.
Remedies of receiver for possession of, see RECEIVERS.
Of school district, see SCHOOLS AND SCHOOL DISTRICTS, 1-5.

Prosecuting Attorneys:

See DISTRICT AND PROSECUTING ATTORNEYS.

Provisos:

In statutes, see STATUTES, 2.

Proximate Cause:

Of injury, see MASTER AND SERVANT, 3.
Of collision in city street, see MUNICIPAL CORPORATIONS, 7.
Of collision with auto at crossing, see STREET RAILROADS, 3.

Public Debt:

See MUNICIPAL CORPORATIONS, 17-19.

Public Lands:

1. PUBLIC LANDS (9)—WATERS AND WATER COURSES (45)—SURVEY—MEANDER LINES—RIGHT TO BED OF STREAM. Government meander lines of a stream, marking fractional portions of the public domain, are run to ascertain the quantity of land in the fractions and not as boundary lines, and the patentee takes to the thread of an unnavigable stream. *Harper v. Holston* 436

Public Policy:

Charitable devise for teaching of system of treatment for disease as against public policy, see CHARITIES.

Public Schools:

See SCHOOLS AND SCHOOL DISTRICTS.

Public Use:

Legislative declaration of, see CONSTITUTIONAL LAW, 2, 3.
Taking property for public use, see EMINENT DOMAIN.

Punishment:

For unlawful loan of funds to officer, see BANKS AND BANKING, 3.

Quantum Meruit:

Necessity of amendment for recovery on, see PLEADING, 4.

Quarantine:

Against disease, see HEALTH.

Quashing:

Attachment, see ATTACHMENT.

Question for Jury:

See HOMICIDE, 2, 3.
In action for breach of contract, see CONTRACTS, 7.
In action for injuries to servant, see MASTER AND SERVANT, 2, 5.
Negligence in driving automobile, see MUNICIPAL CORPORATIONS, 5, 14.
Negligence of driver of auto struck by street car, see STREET RAILROADS, 2.

Quieting Title:

1. QUIETING TITLE (23)—PARTIES. Under a contract by a parent to convey the home place to a daughter upon certain conditions, all of which have been performed, the latter is entitled to a decree quieting her title therein as against another daughter, who, with knowledge of the arrangement, had procured a mortgage of the property from the mother without the advancing of any consideration. *Slavin v. Ackman*..... 48

Quotient Verdict:

As ground for new trial, see NEW TRIAL, 2.

Railroads:

Carriage of goods and passengers, see CARRIERS, 4, 5.
Railroads in city streets, see STREET RAILROADS.

Rape:

Election between acts by prosecution, see CRIMINAL LAW, 9, 10.
Compelling witness to incriminate himself, see WITNESSES, 3, 4.

1. RAPE (21) — EVIDENCE — ADMISSIBILITY — PERSONAL RELATIONS—OTHER ACTS. In a prosecution for statutory rape upon a child under the age of consent, evidence of the details of other acts of sexual intercourse is admissible in corroboration of the prosecutrix, where the time covered was but two months, during which their relations were continuous. *State v. Crowder*..... 450

Rates:

Regulation of gas rates, see GAS.

Ratification:

Of unauthorized or defective delivery of deed, see DEEDS.
Of act of agent, see PRINCIPAL AND AGENT, 2.

Real Estate Agents:

See BROKERS.

Real Property:

Effect of abandonment of, see ABANDONMENT.
Adverse possession, see ADVERSE POSSESSION.
Title to support action to recover, see EJECTMENT.
Rights under fishing license, see FISH.
Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2-4.
Contracts for conveyance, see VENDOR AND PURCHASER.

Rebuttal:

Scope of evidence in rebuttal in criminal cases, see CRIMINAL LAW, 11.
Evidence to impeach witness, see WITNESSES, 7, 8.

Receivers:

1. RECEIVERS (39)—TITLE AND POSSESSION OF PROPERTY—REMEDIES OF RECEIVERS—CONTEMPT PROCEEDINGS. Where an officer of a corporation, after appointment of the receiver, wrongfully came into the possession of a government warrant belonging to the insolvent corporation, and cashed it and failed to forward the proceeds to the receiver, he can be compelled to do so in contempt proceedings; and it is no defense that, since the contempt proceedings were instituted, third persons claiming an interest therein had brought suit to recover the same; since the order in contempt will be a complete defense to the action. *Wonder v. Olympic Smelters Co*..... 614

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 11-13.
Chattel mortgage, see CHATTEL MORTGAGES, 1-4.
As evidence, see CRIMINAL LAW, 6.
Failure to record assignment of mortgage as affecting priority of lien, see MECHANICS' LIENS, 9, 10.

Reference:

See ARBITRATION AND AWARD.

Regulation:

Of carriers, see CARRIERS, 1-3.
Health regulations, see HEALTH.
Of water supply for irrigation, see WATERS AND WATER COURSES, 6-8.

Rehearing:

See NEW TRIAL.

Release:

Liability for rent, see LANDLORD AND TENANT, 5.

Relevancy:

Of evidence in criminal action, see CRIMINAL LAW, 1.

Remedies:

For personal injuries under workmen's compensation act, see MASTER AND SERVANT, 6-9.

Removal:

Of mortgaged personal property, see CHATTEL MORTGAGES, 3.
Of corporate employee, see CORPORATIONS, 2.
Of public officers or employees, see MUNICIPAL CORPORATIONS, 1.

Removal of Causes:

Change of venue or place of trial, see VENUE.

Rent:

See LANDLORD AND TENANT, 5.

Repairs:

Competency of evidence of cost of repairs to damaged automobile, see EVIDENCE, 2.
Of premises demised, see LANDLORD AND TENANT, 5.

Reparation:

Offer of return of money stolen as defense, see EMBEZZLEMENT, 2.

Reply:

Departure from complaint, see PLEADING, 2.

Requests:

For instructions in criminal prosecutions, see CRIMINAL LAW, 13, 24.

Res Gestae:

In criminal prosecutions, see CRIMINAL LAW, 2, 3.

Residence:

Of parties to action as affecting venue, see VENUE.

Res Judicata:

See JUDGMENT, 1-7.
Order of dismissal as bar to consolidated actions, see ACTION, 2.
Bar by election of one of two inconsistent remedies, see ELECTION OF REMEDIES.
Discharge on habeas corpus as bar, see HABEAS CORPUS.

Revenue:

See TAXATION.

Review:

See HABEAS CORPUS.
In civil actions, see APPEAL AND ERROR.
Scope and extent, see CERTIORARI.
In criminal prosecution, see CRIMINAL LAW, 20-25.

Review—Continued.

Of condemnation proceedings, see EMINENT DOMAIN, 5.
Of orders of industrial insurance department, see MASTER AND SERVANT, 6, 7, 9.
Of acts removing civil service employee, see MUNICIPAL CORPORATIONS, 1.

Risks:

Assumed by employee, see MASTER AND SERVANT, 1, 2, 10.

Roads:

Streets in cities, see MUNICIPAL CORPORATIONS, 2-14.

Robbery:

Evidence in prosecution for, see CRIMINAL LAW, 1, 7.

Rule of Decision:

See COURTS.

Safe Place to Work:

See MASTER AND SERVANT, 1, 2, 5.

Sales:

By mortgagor of stock in trade, see CHATTEL MORTGAGES, 5.
Evidence of similarity of conditions, in action for breach of warranty, see EVIDENCE, 3.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1.
Of standing timber, see LOGS AND LOGGING.
Foreclosure sales, see MORTGAGES, 2.
Agency or sales contract, see PRINCIPAL AND AGENT, 1.
Of real property, see VENDOR AND PURCHASER.

1. SALES (42)—CONTRACT—MODIFICATION — EVIDENCE — SUFFICIENCY. A written contract for the sale of hay, subject to the rules of an exchange permitting twenty per cent inferior grade to be tendered, is not modified by correspondence between the parties in which the seller, after several shipments had been rejected by the buyer, gave assurance that the balance of the hay would be satisfactory to the buyer and that the contract would be completed with No. 1 hay. *Jahn & Co. v. Puyallup & Sumner Fruit Growers Canning Co*.... 422

2. SALES (75)—PERFORMANCE OF CONTRACT—INSPECTION AND APPROVAL—FRAUD—EVIDENCE—SUFFICIENCY. A buyer having the privilege of calling for inspection at the point of delivery, its acceptance of and payment for cars of hay without such inspection affords no support for a charge of fraud in the certificate of inspection issued at point of shipment. *Jahn & Co. v. Puyallup & Sumner Fruit Growers Canning Co*..... 422

3. SALES (113, 117, 165)—WARRANTY OF FITNESS—BREACH—WAIVER—ACCEPTANCE—DAMAGES. The purchaser of canned tomatoes from the

Sales—Continued.

manufacturer who accepts the goods on inspection may nevertheless recover for latent defects through improper canning for breach of implied warranty that the goods were fit for human consumption and capable of being kept the customary time. *Los Angeles Olive Growers Association v. Pacific Grocery Co*..... 293

4. SAME (117)—WARRANTY—WAIVER OF BREACH. Under a manufacturer's sale of canned tomatoes, providing that claims for "swells" must be made within six months, and all other claims within ten days from the receipt of the goods, the ten-day provision relates only to patent defects, where all damaged cans would first swell, and the defects could not be discovered within the ten-day period; since an unreasonable limitation for the discovery of latent defects will not protect the seller. *Los Angeles Olive Growers Association v. Pacific Grocery Co*..... 293

Schools and School Districts:

Power of directors to enforce health regulations, see HEALTH, 2.

1. SCHOOLS AND SCHOOL DISTRICTS (21-1)—ACQUISITION AND USE OF PROPERTY—TEACHERS' DWELLINGS—STATUTES. Rem. Code, §§ 4481, 4486, 4493, 4532, 4538 and 4539 of the school code [Rem. Comp. Stat., §§ 4776, 4782, 4789, 4829, 4835 and 4836] do not give school districts of the third class any authority to erect dwellings for the use of school teachers. *Hansen v. Lee* 691

2. SAME (21-1). An allegation that a school district had erected a dwelling house for teachers in conformity with the communal district act [Rem. Comp. Stat., §§ 4837-4840] is sufficient, as against a general demurrer, to show that the district was attempting to come within the provisions of the law, and so was authorized to erect a dwelling for teachers. *Hansen v. Lee*..... 691

3. SAME (21-1). Rem. Comp. Stat., § 4839, of the communal school act, providing that the supervisors of a school district intending to assume the functions mentioned in Id., § 4837, including the power to erect dwellings for teachers, must approve the plans of any district for carrying out the act, has reference to the general plans for putting in force the general purposes of the act, and does not require that the supervisors approve the plans of the dwelling to be constructed. *Hansen v. Lee*.....691

4. SAME (21-1). Under the special act, Rem. Comp. Stat., §§ 4837-4840, authorizing school districts of the second or third class to carry out the communal functions set forth in § 4837, one of which is "to provide suitable dwellings for teachers," only school districts intending to carry out such functions are entitled to erect dwellings for school teachers. *Hansen v. Lee* 691

5. SAME (23)—SCHOOL BUILDINGS—SUBMISSION TO VOTE. Under Rem. Code, § 4538, authorizing school directors to build school build-

Schools and School Districts—Continued.

ings when "directed by a vote of the district so to do," a school building is not authorized by a vote of the district to levy a tax in the maximum amount for "school purposes," the notices of the election having failed to show what, if any, building or buildings would be built. [See Rem. Comp. Stat., § 4835.] *Randall v. School District No. 44* 222

6. SCHOOLS (36)—DISTRICT TAXES—LEVY—ESTIMATES. Under Rem. Code, § 4537, requiring school district trustees to certify an "estimate in detail" of the amount of the levy necessary, a certificate of a ten mill levy "for school purposes" is insufficient to warrant a levy therefor. [See Rem. Comp. Stat., § 4834.] *Randall v. School District No. 44* 222

Searches and Seizures:

Seizure of liquor without warrant, see INTOXICATING LIQUORS, 3.

Self-Serving Declarations:

See EVIDENCE, 4-6.

Sentence:

For unlawful loan of funds to officer, see BANKS AND BANKING, 3.
In criminal prosecutions, see CRIMINAL LAW, 17-19.

Separate Estate:

Of husband or wife, see HUSBAND AND WIFE, 1-4.

Servants:

See MASTER AND SERVANT.

Set-Off and Counterclaim:

Necessity for presentation of claim as prerequisite to counterclaim, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Settlement:

Of bill of exceptions or statement of facts, see APPEAL AND ERROR, 13.

Severance:

Of cotenancy, see TENANCY IN COMMON, 1.

Shipping:

Carriage of goods, see CARRIERS, 4, 5.

Silence:

Of accused as admissions, see CRIMINAL LAW, 4.

Soldiers' Bonus:

See TAXATION, 1.

Speed:

Negligent use of streets, see MUNICIPAL CORPORATIONS, 10.

Speedy Trial:

Right of accused to, see CRIMINAL LAW, 8.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 11-13.
Of claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.
By witness inconsistent with testimony, see WITNESSES, 6.

States:

Right of state to review order suppressing evidence in criminal case, see CERTIORARI, 2, 3.
Legislative power, see CONSTITUTIONAL LAW, 2, 3.
Executive power, see CONSTITUTIONAL LAW, 4.
Appeals in criminal actions, see CRIMINAL LAW, 20, 21.
State board of health, see HEALTH.
Inheritance taxes, see TAXATION, 4, 5.

1. STATES (25)—APPROPRIATIONS—"CAPITAL OUTLAYS"—POWERS OF OFFICERS—IMPROVEMENTS TO ARMORY. Under Laws 1921, p. 581, § 2, defining capital outlays by the state as those relating to the purchase of property and the making of new improvements, and the general appropriation act (Laws 1921, p. 605), the adjutant general is vested with authority and discretion to make an addition to an armory previously established by legislative enactment. *State ex rel. Thompson v. Burch*..... 1

Statutes:

See DRAINS; FORCIBLE ENTRY AND DETAINER; FRAUDS, STATUTE OF; INSURANCE.
Control and regulation of carriers, see CARRIERS, 1-3.
Recording of chattel mortgages, see CHATTEL MORTGAGES, 3, 4.
Rules of construction, see CONSTITUTIONAL LAW, 1.
Appointment of deputy, assistant or substitute prosecuting attorneys, see DISTRICT AND PROSECUTING ATTORNEYS.
Construction of attachment and garnishment laws as in *pari materia*, see GARNISHMENT, 1.
Maintenance of highways by county, see HIGHWAYS, 1.
Defining larceny, see LARCENY.
Statutes of limitation, see LIMITATION OF ACTIONS.
Remedies of workman under compensation act, see MASTER AND SERVANT, 8.
City ordinances, see MUNICIPAL CORPORATIONS, 6-9.
Limiting expenditures for municipal purposes, see MUNICIPAL CORPORATIONS, 17, 19.

Statutes—Continued.

Relating to election or term of office, see OFFICERS.
Actions by partnerships, see PARTNERSHIP, 3.
Regulating practice of medicine, see PHYSICIANS AND SURGEONS, 1, 2.
Authorizing district to erect teachers' dwellings, see SCHOOLS AND SCHOOL DISTRICTS, 1-4.
Tolling time for payment of inheritance tax, see TAXATION, 4, 5.

1. STATUTES (9)—PARTIAL INVALIDITY. Under Rem. Comp. Stat., § 11251, providing that the invalidity of any part of the poll tax law shall not invalidate the balance of the act, a taxpayer cannot complain of the illegality of allowing the counties to retain one-fifth of the tax, since otherwise it would all go to the state. *Nipges v. Thornton* 464

2. STATUTES (74)—CONSTRUCTION—PROVISOS. The ordinary purpose of a proviso being to except something from the operation of the act, it should not be given the effect of changing the entire purport of the act. *State ex rel. Pendleton v. Superior Court*..... 73

Stay:

Of sentence in criminal prosecutions, see CRIMINAL LAW, 17-19.

Stock in Trade:

Chattel mortgages on, see CHATTEL MORTGAGES, 1.

Streams:

Thread of stream as boundary line in government patent, see PUBLIC LANDS.

Street Railroads:

Collision with vehicle, see CARRIERS, 6.
Right to use of general funds in operation of by city, see MUNICIPAL CORPORATIONS, 19.

1. STREET RAILROADS (20)—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE. One driving an automobile toward a street car line, at a rate of speed low enough to permit of his stopping the automobile after seeing a street car approaching the crossing, is guilty of contributory negligence in a collision resulting from his driving upon the track, irrespective of whether the street car may have been exceeding the speed limit, and his negligence is imputable to his employers who were occupants of the automobile. *Cole v. Washington Water Power Co*..... 29

2. STREET RAILWAYS (20, 29)—CONTRIBUTORY NEGLIGENCE—DRIVERS OF VEHICLES—QUESTION FOR JURY. Whether the driver of an automobile, struck by a street car at an intersection, was guilty of contributory negligence in not seeing the approaching street car, of which he had an unobstructed view while waiting for another street

Street Railroads—Continued.

car to pass, is a question for the jury, where the street car, without any signal or warning, was approaching at such an excessive speed that there is room for an honest difference of opinion as to whether a reasonably prudent man would have concluded that there was no approaching car near enough to hit him before he crossed the tracks. *Plastino v. Seattle* 195

3. STREET RAILROADS (22) — COLLISION AT CROSSING — PROXIMATE CAUSE. The failure to sound a street car signal on approaching a street crossing cannot be ascribed as the proximate cause of collision between the car and an automobile, where both the driver and an occupant of the automobile were aware of the approach of the car in sufficient time to have avoided the collision. *Cole v. Washington Water Power Co* 29

4. SAME (34)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE. An instruction as to the duty of an automobile driver in crossing street car tracks is not erroneous or misleading in stating that failure to look and listen is not necessarily contributory negligence. *Plastino v. Seattle* 195

Streets:

See MUNICIPAL CORPORATIONS, 2-14.
Power of city to regulate use of, see CARRIERS, 3.

Subcontractors:

See MECHANICS' LIENS, 7.

Submission of Controversy:

To arbitrators by agreement of parties, see ARBITRATION AND AWARD.

Suit Money:

In action for maintenance, see HUSBAND AND WIFE, 5.

Supplemental Proceedings:

See EXECUTION.

Support:

Of insane persons, see INSANE PERSONS.

Surgeons:

See PHYSICIANS AND SURGEONS.

Surprise:

Ground for new trial, see CRIMINAL LAW, 16.

Surrender:

Of lease, see LANDLORD AND TENANT, 5.

Surveys:

Of public lands, see PUBLIC LANDS.

Suspension:

Of sentence, see CRIMINAL LAW, 17-19.
Of statute on reversal of judgment, see LIMITATION OF ACTIONS, 2.

Taxation:

School taxes, see SCHOOLS AND SCHOOL DISTRICTS, 5, 6.
Effect of partial invalidity of poll tax law, see STATUTES, 1.

1. TAXATION (5)—CONSTITUTIONAL RESTRICTIONS—STATEMENT OF OBJECT—POLL TAXES. The poll tax law, Rem. Comp. Stat., §§ 11242 to 11246, does not offend against Const., art. 7, § 5, providing that every law imposing a tax shall state distinctly the object of the same, by reason of the proviso to § 11246 making it the duty of the legislature to make further appropriations, if the sums collected for poll taxes shall be insufficient to pay the principal and interest on the soldiers' bonus bonds; since all the moneys collected are deposited in the state general fund to be used freely without reference to future contingencies. *Nipges v. Thornton* 464

2. TAXATION (5)—CONSTITUTIONAL RESTRICTIONS—LEVIES ON COUNTIES—POLL TAX. Rem. Comp. Stat., § 11246, levying a poll tax, one-fifth of which is retained by the counties collecting the same and goes to their current expense funds, does not offend against Const., art. II, § 12, providing that the legislature shall have no power to impose taxes upon counties, cities, etc.; since the one-fifth part in question is a proper allowance for reimbursing the counties for the expense of collecting the tax. *Nipges v. Thornton* 464

3. SAME (6)—CONSTITUTIONAL RESTRICTIONS. The poll tax law, Rem. Comp. Stat., §§ 11242-11251, does not offend against Const., art. 7, §§ 1 and 2, requiring all property to be taxed according to its value at a uniform and equal rate; since there is no prohibition against poll or capitation taxes, and sources of revenue other than property taxes are recognized. *Nipges v. Thornton* 464

4. TAXATION (226)—INHERITANCE TAX—INTEREST—STATUTES—"NECESSARY LITIGATION." Rem. Comp. Stat., § 11210, tolling the fifteen months within which inheritance taxes must be paid in order to avoid interest charges, if by reason of "necessary litigation" the sum due could not be determined within that period, is not limited to questions concerning the computation, but includes unsuccessful litigation disputing the right of the state to collect the tax. *In re Duncan's Estate* 426

5. SAME (226). The fact that the right of the state to collect an inheritance was unsuccessfully contested, does not show that the litigation was not "necessary" within Rem. Comp. Stat., § 11210, tolling the time for payment during "necessary" litigation, where

Taxation—Continued.

the contest was in good faith and of such doubt as to lead the trial court into error. *In re Duncan's Estate*..... 426

Teachers:

Dwellings for school teachers, see SCHOOLS AND SCHOOL DISTRICTS, 1-4.

Tenancy in Common:

1. TENANCY IN COMMON (1-1)—SEVERANCE—AGREEMENT FOR. Where tenants in common, after severally listing their interests with the same agent, at different prices, entered into a written agreement that they were jointly and equally interested in the sale of the tract, the agreement overcomes indefinite and unsatisfactory evidence of a parol partition between them. *Bemis v. Meyer*..... 599

2. SAME (11)—MUTUAL RIGHTS—ESTOPPEL BETWEEN CO-TENANTS. In an action between tenants in common for an accounting of the purchase price received on the sale of the tract, a tenant who induced the purchaser to make payment of the remainder of the funds to him in violation of the terms of the contract requiring the same to be paid to the escrow holder, cannot complain of a judgment awarding his co-tenant a lien on the land for the whole amount due him. *Bemis v. Meyer*..... 599

Tender:

Of performance by vendee as condition precedent to rescission, see VENDOR AND PURCHASER, 1.

Term:

Of office, see OFFICERS.

Theft:

See LARCENY.
Action on auto theft policy, see INSURANCE, 3.

Timber:

Cutting and sale of timber, see LOGS AND LOGGING.

Time:

For taking exception to ruling for purpose of review, see APPEAL AND ERROR, 10.
For recording chattel mortgage, see CHATTEL MORTGAGES, 3.
Certainty as to duration of contract, see CONTRACTS, 1.
For performance of contract, see CONTRACTS, 4.
Of offense, election between acts, see CRIMINAL LAW, 9, 10.

Title:

Effect of abandonment of real property, see ABANDONMENT.
To maintain ejectment, see EJECTMENT.
Removal of cloud, see QUIETING TITLE.
Of receivers, see RECEIVERS.
Defect as ground for rescission of sale of land, see VENDOR AND PURCHASER, 1, 2.
To bed and banks of stream, see WATERS AND WATER COURSES, 4, 5.

Tolling:

Of statute by new action after failure of former action, see LIMITATION OF ACTIONS, 2.
Payments to mortgagee by subsequent purchasers as tolling statute, see MORTGAGES, 3.
Time for payment of inheritance tax, see TAXATION, 4, 5.

Torts:

See FORCIBLE ENTRY AND DETAINER; FRAUD; NEGLIGENCE; NUISANCE.
Form of action, contract or tort, see ACTION, 1.
In carriage of passengers, see CARRIERS, 6, 7.
Damages, inadequate or excessive, see DAMAGES, 2, 3.
Election of remedy for personal injuries, see ELECTION OF REMEDIES.
Injuries caused by defects or obstructions in road, see HIGHWAYS.
Limitation of action for damages to property, see LIMITATION OF ACTIONS.
Defects in water pipes, see MUNICIPAL CORPORATIONS, 15, 16.
Injuries caused by operation of street cars, see STREET RAILROADS.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 11-13.

Trial:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 5-10.
Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 11-13.
Review of rulings involving discretion of court, see APPEAL AND ERROR, 15.
Review of findings in trial by court, see APPEAL AND ERROR, 16-18.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 19-22.
In criminal prosecutions, see CRIMINAL LAW.
Instructions as to measure of damages for breach of contract, see DAMAGES, 1.
Instructions as to damages for mental anguish, see DAMAGES, 5.
Right to trial by jury, see JURY.
Instructions in action for injuries to servant, see MASTER AND SERVANT, 3, 10.

Trial—Continued.

Instructions in action for injuries from automobiles in city street, see MUNICIPAL CORPORATIONS, 4, 9, 10, 13.
Motions and grounds for new trial, see NEW TRIAL.
Adding new parties, see PARTIES.
Amendment of pleadings at trial, see PLEADING, 5, 6.
Instructions in action for damages from collision with street car, see STREET RAILROADS, 4.
Place of trial, see VENUE.
Competency and examination of witnesses, see WITNESSES.

1. TRIAL (10)—RIGHT TO OPEN AND CLOSE. In an action on contract, where the complaint was admitted and the sole issue was on a counterclaim, the defendant had the burden of proof and was entitled to open and close. *Los Angeles Olive Growers Association v. Pacific Grocery Co*..... 293

2. TRIAL (50)—CONDUCT OF COUNSEL—RETALIATORY REMARKS. Error cannot be predicated upon argument of counsel responsive to statements made by counsel, which the jury were instructed to disregard. *Oliver v. Taylor*..... 190

3. TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY THE EVIDENCE. An instruction on the assumption of risks and the effect of momentary forgetfulness of a danger is prejudicial error where there was no evidence in the case as to momentary forgetfulness of the danger. *Belkin v. Skinner & Eddy Corporation*..... 80

Uniformity:

Of taxes, see TAXATION, 3.

Unlawful Detainer:

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT, 5.

Vaccination:

Of school children, see HEALTH, 2.

Value:

Competency of testimony showing value, see EVIDENCE, 2.
Opinion evidence as to value of property, see EVIDENCE, 8.
Valuation of property for rate making, see GAS.

Variance:

In pleading, see PLEADING, 2.

Vendor and Purchaser:

Contract for sale of land by broker, see BROKERS.
False representations in sale of land, see FRAUD, 2.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2-4.
Transfer of mortgaged property, see MORTGAGES, 2, 3.
Transfers of ownership of personal property, see SALES.

Vendor and Purchaser—Continued.

1. VENDOR AND PURCHASER (63, 65)—RESCISSION BY PURCHASER—DEFECT IN TITLE—CONDITIONS PRECEDENT. A contract for the purchase of a rooming house will not be rescinded without tender of performance by the purchaser, because of an alleged incumbrance or lien, contrary to the representations of the vendor, where the purchaser had not been disturbed in her possession. *Wilson v. Fay*..... 88

2. VENDOR AND PURCHASER (63, 160)—RESCISSION BY PURCHASER—RECOVERY OF PRICE—FAILURE OF TITLE. An action lies to recover money paid and rescind an executory contract for the sale of land, assigned to the plaintiffs, where a house and other improvements constituting the principal part of the consideration were not wholly on the lots, as represented, and the sellers refused to make the title to the house good or return the money. *Henderson v. Miller*..... 362

3. VENDOR AND PURCHASER (64)—RESCISSION BY PURCHASER—ESTOPPEL. A contract for the purchase of a rooming house will not be rescinded because of the vendor's failure to deliver a copy of the contract, where the purchaser remained in possession and made payments called for by the contract at a bank where the copy was kept. *Wilson v. Fay*..... 88

4. VENDOR AND PURCHASER (127)—RIGHTS AND LIABILITIES—BONA FIDE PURCHASERS—POSSESSION. Purchasers of premises become the owner of a growing crop thereon, as against a tenant under an unrecorded lease, as bona fide purchasers, where they had no notice of the lease or of any rights of the tenant. *Miller v. Smith*..... 163

Venue:

Of action against corporations, see CORPORATIONS, 3.

1. VENUE (9-1)—RESIDENCE OF PARTIES—CO-DEFENDANTS. Where part of the defendants were properly suable in the county, co-defendants are not entitled to a change of venue on the ground of residence in another county. *State ex rel. Nichols v. Superior Court*..... 218

Verdict:

As curing error on appeal, see APPEAL AND ERROR, 22.
In criminal prosecutions, review, see CRIMINAL LAW, 22.
Irregularities or defects ground for new trial, see NEW TRIAL, 2, 3.

Vested Rights:

Rights under fishing license, see FISH.

Voters:

Submission of question of school buildings to popular vote, see SCHOOLS AND SCHOOL DISTRICTS, 5.

Waiver:

Breach of contract, see CONTRACTS, 6, 7.
Of right to speedy trial, see CRIMINAL LAW, 8.
Of right to forfeit contract for sale and removal of timber, see LOGS AND LOGGING, 2.
Of claim against agent, see PRINCIPAL AND AGENT, 2.
Breach of warranty in sale, see SALES, 3, 4.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 3.
Testimony as to transactions with person since deceased, see WITNESSES, 2.

Warrant:

Authority to arrest without warrant, see ARREST.
Seizure of liquor without search warrant, see INTOXICATING LIQUORS, 3.
Mandamus to compel issuance of county warrant, see MANDAMUS.

Warranty:

Evidence of similarity of conditions, in action for breach of, see EVIDENCE, 3.
On sale of goods, see SALES, 3, 4.

Waters and Water Courses:

Legislative power to declare public use in condemnation, see CONSTITUTIONAL LAW, 2.
Works for protection or improvement of lands, see DRAINS.
Exercise of power of eminent domain, see EMINENT DOMAIN, 1-3.
Liability of city for defects in water pipes, see MUNICIPAL CORPORATIONS, 15, 16.
Waters capable of navigation, see NAVIGABLE WATERS.
Streams as boundary in government patent, see PUBLIC LANDS.

1. WATERS AND WATER COURSES (1)—APPROPRIATION. The water between high and low water mark in a navigable lake is subject to appropriation for irrigation. *Ortel v. Stone* 500

2. SAME (10-13)—APPROPRIATION—PRIORITIES—QUANTITY. The measure of the rights of a prior appropriator who claimed all the waters of a navigable lake for irrigation is the amount of water actually taken and put to a beneficial use, and the same cannot be increased by subsequent needs, as against a subsequent appropriator. *Ortel v. Stone* 500

3. SAME (10, 15)—APPROPRIATION—PRIVITY—CHANGES. A subsequent appropriator of surplus waters in a lake has the right to add and store waters in the lake for his use, subject to prior rights, and under supervision of the hydraulic engineer under Rem. Comp. Stat., § 7390. *Ortel v. Stone* 500

4. WATERS AND WATER COURSES (46)—BED AND BANKS OF STREAM—ACCRETION. Where a meandered stream, constituting the boundary

Waters and Water Courses—Continued.

of government fractional subdivisions, gradually shifts its location, a subsequent patent of the fractional lot conveys title to any accretions. *Harper v. Holston* 436

5. SAME (46). The shifting of a government meandered stream is shown to have been gradual, so that the gains were made by accretion, and not by avulsion, where all the witnesses testified that there were no sudden changes and there is no evidence of abandoned channels characteristic of avulsions. *Harper v. Holston* 436

6. WATERS AND WATER COURSES (99)—IRRIGATION—REGULATION OF SUPPLY. Where a decree apportions the water of a stream to various tracts, one user not actually prejudiced cannot complain because another user of two tracts diverts the percentage apportioned to one of his tracts and uses it all upon the other. *Osborn v. Chase*.... 476

7. SAME (99). Where a decree apportions water of a stream to various tracts on a percentage basis, the adoption of a rotation plan does not entitle a lower owner to have a pond on the land of an upper owner completely drained on the days he is allowed to use the water, when only the overflow joins the stream, where the pond is filled from the upper owner's share of the water. *Osborn v. Chase* 476

8. SAME (99). Where the waters of a stream have been apportioned by a decree of court on a percentage basis, the hydraulic engineer can only enforce the decree and cannot order a rotation plan conflicting with the percentages. *Osborn v. Chase* 476

Ways:

Condemnation of private way of necessity, see EMINENT DOMAIN, 4.

Wills:

Charitable bequests and devises, see CHARITIES.

Witnesses:

Harmless error, see CRIMINAL LAW, 23.

Testimony as to transactions with person since deceased, see EVIDENCE, 4.

Opinions, see EVIDENCE, 7, 8.

Newly discovered impeaching testimony as ground for new trial, see NEW TRIAL, 4.

1. WITNESSES (44, 47)—COMPETENCY—TRANSACTIONS WITH DECEASED—SUBJECT-MATTER—SERVICES. Testimony as to a letter and its contents received from a deceased person, and of acts and services rendered deceased in conformity with such letter, is not within Rem. Code, § 1211, prohibiting a party in interest from testifying as to transactions with one since deceased. *Slavin v. Ackman* .. 48

2. WITNESSES (48-1)—TRANSACTIONS WITH DECEASED—WAIVER. Rem. Code, § 1211, excluding testimony of transactions with a deceased

Witnesses—Continued.

is waived, where administrators suing a surviving partner, introduced portions of the testimony of the defendant in a former proceeding to show contradictory statements; and they cannot object to defendant's introduction of the complete transcript for the purpose of reconciling his statements. *Levy v. Simon* 179

3. WITNESSES (84, 94)—CROSS-EXAMINATION—ACCUSED AS WITNESS—CONSTITUTIONAL PRIVILEGE. While accused, by taking the stand, submits himself to proper cross-examination upon a pertinent subject, yet, under Const., art. 1, § 9, providing that no person shall be compelled to give evidence against himself, such cross-examination (aside from impeachment) must be based only upon subjects opened up by his examination in chief. *State v. Crowder* 450

4. SAME (84, 94). In a prosecution for statutory rape, on a day certain, in which the accused took the stand and testified to forming an acquaintance with the prosecutrix, but that the same had terminated prior to the day in question, it is a violation of his constitutional right against self incrimination to compel him, on cross-examination, to testify to acts of intercourse with the prosecuting witness on three or four occasions, one being the act relied on by the state. *State v. Crowder* 450

5. WITNESSES (104, 105)—CREDIBILITY—FORMER CONVICTION—ARREST. Cross-examination of the accused and rebuttal evidence as to a previous arrest of the accused for a distinct offense, not confined to the question of a previous conviction of a crime, is inadmissible under Rem. Code, §§ 1212, 2148, 2290, relating to evidence of a previous conviction and the cross-examination of the accused. *State v. Dale* 604

6. WITNESSES (122)—IMPEACHMENT—INCONSISTENT STATEMENTS. An accomplice testifying that accused drove the perpetrators of a robbery over a certain route, may be impeached by his statement, made in the absence of the accused, that he drove over another route, as testified to by another witness. *State v. Simpson*..... 653

7. WITNESSES (126-1)—CROSS-EXMINATION — IMPEACHMENT — COLLATERAL MATTERS. Upon cross-examination of the accused's wife to impeach her evidence as to the exemplary character of the accused, her denial of a statement that he had committed other acts for which he could be sent over the road is a collateral matter binding on the state, and it is error to permit rebuttal thereof by the evidence of another witness. *State v. Carroll*..... 623

8. SAME (126-1)—IMPEACHMENT—CONTRADICTION—COLLATERAL MATTERS. Where the state, on cross-examination, explores the subject of a previous arrest of the accused for a distinct offense, it is bound by the answers as upon a purely collateral matter, and it is reversible error to permit the state to introduce rebuttal evidence thereon. *State v. Dale*..... 604

Woods and Forests:

Cutting and sale of timber, see LOGS AND LOGGING.

Work and Labor:

Liens for work and materials, see MECHANICS' LIENS.

Workmen's Compensation Act:

See MASTER AND SERVANT, 6-9.

Filing claim under as election of remedy for injuries, see ELECTION OF REMEDIES.

Writings:

Parol evidence to vary writings, see EVIDENCE, 5; MORTGAGES, 1.

Writs:

See ATTACHMENT; CERTIORARI; GARNISHMENT; HABEAS CORPUS; INJUNCTION; MANDAMUS.

Ex. DC.
10/22,